Supreme Court, U.S.
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No. ______________

In the

Supreme Court of the United States

OCTOBER TERM, 1998

Jennifer Marie Conrad,
Petitioner,
v.
The State of Texas,
Respondent,

On Petition for a Writ of Certiorari to the Court of Appeals for the Fourteenth District of Texas Sitting at Houston, Texas

PETITION FOR A WRIT OF CERTIORARI

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160pp

QUESTIONS PRESENTED FOR REVIEW

1. Does a person have a legitimate or reasonable expectation of privacy in personal medical records, including a blood-alcohol test result, maintained by a hospital regarding her medical treatment at the hospital for injuries sustained during an automobile accident, and thus standing to complain at her involuntary manslaughter trial of an unreasonable, warrantless search of her medical records by a state law enforcement official in violation of the Fourth and Fourteenth Amendments to the United States Constitution?

2. Does the Fourth Amendment exclusionary rule require that a person's personal medical records, including a blood-alcohol test result, obtained by a state law enforcement agent as the product of an unlawful warrantless seizure from a hospital medical records custodian be suppressed from evidence at her involuntary manslaughter trial where she has a possessory interest in the hospital medical records as a matter of law by virtue of a state statute, and thus standing to complain of an unreasonable seizure, regardless of whether she has a legitimate or reasonable expectation of privacy in the medical records for the purpose of standing to complain of an unreasonable search?

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Jennifer Marie Conrad respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Fourteenth District of Texas in this case.

OPINION AND ORDERS BELOW

The opinion of the Court of Appeals for the Fourteenth District of Texas (Appendix A) is not yet reported in the Southwestern Reporter, but may be found at 1997 WL 764527 (Tex. App.-- Houston [14th Dist.]). Other orders relevant to the case appearing in the Appendix, *infra*, are unreported.

JURISDICTION

The Court of Appeals for the Fourteenth District of Texas entered its opinion and judgment complained of in this case on December 11, 1997. Timely filed motions for rehearing and rehearing en banc were overruled by said court on February 26, 1998. A timely filed petition for discretionary review to the Court of Criminal Appeals of Texas was refused by said court on September 16, 1998. A timely filed motion for rehearing as to the refusal of the petition for discretionary review was denied by the Court of Criminal Appeals of Texas on November 18, 1998. This petition for a writ of certiorari is being filed within 90 days from November 18, 1998 as required by Sup. Ct. Rules 13.1 and 13.3.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Constitution, Amendment IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

U.S. Constitution, Amendment XIV, §1

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of law.

STATEMENT OF THE CASE

Petitioner is charged with the offense of involuntary manslaughter in violation of Section 19.05(a)(2) of the Texas Penal Code in Cause No. 94-13612 in the 183rd District Court of Harris County, Texas for allegedly causing the death of Judy Brown on May 6, 1994 by accident or mistake while driving a motor vehicle while intoxicated. The only evidence in possession of the State of Texas to show Petitioner was intoxicated on the occasion in question is a blood-alcohol test result contained in Petitioner's medical records at a hospital where she was treated for injuries sustained during the May 6, 1994 automobile accident. The blood-alcohol test was conducted for the purpose of medical treatment of Petitioner at the hospital, and was not performed at the instance of any law enforcement agents. A copy of all of Petitioner's medical records concerning her medical treatment after the automobile accident, including her blood-alcohol test result, was seized by a Harris County Deputy Sheriff from the hospital's medical records custodian on or about May 15, 1994 through a warrantless seizure involving use of an illegitimate and unlawfully issued grand jury subpoena form to induce the medical records custodian to release the records to the deputy. The 183rd District Court suppressed use of Petitioner's medical records and blood-alcohol test result at her trial, finding, among other things, that said records and test result were obtained as a result of *both* an unreasonable seizure and an unreasonable search in violation of the Fourth and Fourteenth Amendments. (Appendix B, 8a-10a, and C, 11a-44a, *infra*).

The State appealed the suppression order to the Court of Appeals for the Fourteenth District of Texas, hereinafter referred to as the court below. The State's primary contention on appeal was that Petitioner had no reasonable expectation of privacy in her medical records for the purpose of standing to complain of an unreasonable search under the Fourth Amendment. The court below initially affirmed the trial court's suppression order in opinions and judgments dated March 27, 1997 (Appendix D, 45a-59a, *infra*) and May 22, 1997 (Appendix E,64a-74a, *infra*) respectively, which held that Petitioner had a reasonable expectation of privacy in her medical records for the purpose of standing. While the State's motion for rehearing as to the May 22, 1997 opinion and judgment was pending, the Court of Criminal Appeals of Texas in a 5-4 decision on November 19, 1997 held that "whatever interests society may have in safeguarding the privacy of medical records, they are not sufficiently strong to require protection of blood-alcohol test results from tests taken by hospital personnel solely for medical purposes after a traffic accident." *State v. Hardy*, 963 S.W.2d 516, 527 (Tex. Crim. App. 1997). The question of whether an individual has a reasonable expectation of privacy in medical records for the purpose of determining standing to complain of an unreasonable search under the Fourth Amendment was not addressed in *Hardy*. Thereafter, on December 11, 1997, the court below issued its "Substituted Opinion" (Appendix A,1a-6a, *infra*) wherein it determined based solely upon the holding in *State v. Hardy*, *supra*, that Petitioner "had no expectation of privacy in any test results showing her blood-alcohol level, and, thus, no standing to challenge the admissibility of that evidence under the Fourteenth Amendment or the statutes and rules governing the use of grand jury subpoenas." The court below accordingly reversed the trial court's order suppressing use of Petitioner's blood-alcohol test result, but affirmed the trial court's order suppressing "the remainder of the medical records," thus implicitly finding a reasonable expectation of privacy in Petitioner's other medical records consistent with its prior opinions in the case. The court below did not address the question of Petitioner's standing to complain of an unreasonable seizure of her medical records under the Fourth Amendment. Petitioner's timely filed motion for rehearing and motion for en banc reconsideration were overruled by the court below on February 26, 1998. (Appendix F, 74a-75a, *infra*). Petitioner's timely filed petition for discretionary review was refused by the Court of Criminal Appeals of Texas on September 16, 1998. (Appendix G, 76a, *infra*). Petitioner's timely filed motion for rehearing as to the refusal of her petition for discretionary review was denied on November 18, 1998. (Appendix H, 78a, *infra*).

Jurisdiction to Review Order Suppressing Evidence

This Court has jurisdiction to review this case under 28 U.S.C. §1257(a) for the following reasons. The appeal in the court below is an interlocutory appeal brought by the State of Texas for the purpose of complaining of a pretrial order suppressing evidence. Petitioner would be precluded from raising the federal constitutional questions and issues presented herein upon a subsequent appeal if she is subsequently tried and convicted because of the law of the case doctrine recognized by courts in the State of Texas precluding relitigation of issues already decided on appeal. *See, e.g., Ex Parte Schuessler*, 846 S.W.2d 850, 852 n.7 (Tex. Crim. App. 1993); *Le Blanc v. State*, 826 S.W.2d 640, 644 (Tex. App. - Houston [14th Dist.] 1992, pet. ref'd). The federal questions and issues would be mooted if Petitioner is subsequently tried and acquitted. The judgment of the court below is accordingly a "final judgment" for the purpose of 28 U.S.C. §1257(a). *See New York v. Quarles*, 467 U.S. 649, 651 n.1 (1984) (pretrial suppression ruling is a final judgment within meaning of 28 U.S.C. §1257). *See also Pennsylvania v. Ritchie*, 480 U.S. 39, 47-48 (1987).

Statement of Facts

The facts as set forth in the opinion of the court below (Appendix A, 1a-6a, *infra*) and its prior withdrawn opinions (Appendix D, 45a-59a, and Appendix E, 60a-73a, *infra*) are incomplete and misleading as the opinions omit discussion of significant material facts found by the 183rd District Court of Harris County, Texas based upon uncontroverted evidence introduced at the hearing on Petitioner's motion to suppress evidence. The 183rd District Court filed detailed findings of fact and conclusions of law (Appendix C,11a-44a, *infra*) in the instant case which were wholly based on uncontroverted, undisputed evidence developed at the hearing on Petitioner's motion to suppress evidence. The findings of fact and conclusions of law were prepared by the 183rd District Court of Harris County, Texas after the court reporter's record of the hearing on the motion to suppress evidence was filed, and contain a detailed discussion of the testimony and other evidence in the case with specific references to the pages of the court reporter's record where the testimony or evidence can be found. A trial court's findings of fact as to historical facts in a case must be treated deferentially by a Texas appellate court where supported by the evidence. *Guzman v. State*, 955 S.W. 2d 85,89 (Tex. Crim. App. 1997). The State of Texas did not challenge any of the 183rd District Court's findings of historical fact on appeal, and the court below did not find any abuse of discretion concerning the factual determinations. The 183rd District Court's findings of fact should accordingly be viewed as conclusive as to the facts of the case. The following is a brief summary of the historical facts of the case as found by the 183rd District Court in its findings of fact and conclusions of law. (Appendix C, 11a-44a, *infra*).

Petitioner was driving an automobile involved in a one-vehicle accident at approximately 10:20 p.m. on May 6, 1994 in Harris County, Texas. Petitioner and several passengers in her vehicle were injured in the accident and were taken by ambulance to various hospitals in the area for medical treatment before any law enforcement officials arrived at the scene. Petitioner was taken to Katy Community Hospital, also known as Katy Medical Center, in nearby Fort Bend County, Texas for medical treatment for her injuries. The medical records of said hospital and its medical records custodian are located in Fort Bend County, Texas.

The accident was investigated by James Hilborn, a Harris County Deputy Sheriff. Hilborn interviewed no witnesses at the scene. Hilborn found some unopened cans or bottles of beer which were cool and wet at the scene. These cans or bottles of beer were not found in Petitioner's vehicle and the 183rd District Court found they were not shown to be connected to Petitioner or her vehicle. Hilborn interviewed Petitioner within a couple of hours after the accident at the emergency room of the hospital where she was taken for medical treatment. Hilborn testified that Petitioner appeared to be injured and confused at the emergency room, but did not appear to be intoxicated. Hilborn was not aware of any evidence to show Petitioner had been drinking or was intoxicated at the time of the accident when he interviewed her at the emergency room. Hilborn did not request Petitioner to submit to any kind of test to determine her blood-alcohol level even though he would have been entitled to request that she submit to such a test under implied consent laws in effect at the time of the accident in Texas if he had reasonable grounds to believe she was intoxicated. Hilborn did not charge Petitioner with any offense on May 6, 1994.

Hilborn subsequently learned Judy Brown, a passenger in the vehicle driven by Petitioner, died several days after the accident. On May 15, 1994, Hilborn obtained a grand jury subpoena form (Appendix M, 123a, *infra*) signed by a Harris County assistant district attorney working in the Intake Division, and not the Grand Jury Division, of the Harris County District Attorney's Office, for the purpose of obtaining Petitioner's medical records from the medical records custodian at the hospital where she was treated after the accident as part of *his personal investigation* of the accident and not that of a grand jury. The instanter subpoena was directed at all of Petitioner's medical records for her medical treatment on May 6, 1994, and was not narrowly tailored for any particular item. No grand jury was considering the case at that time, and the grand jury subpoena form did not issue at the request of the foreperson of a grand jury or an attorney actually representing the state before a grand jury as required by Texas law. Hilborn did not attempt to get a search warrant to obtain Petitioner's medical records as he was not under the impression that he needed a search warrant for this purpose, and obtained the grand jury subpoena form from the intake office where he was always instructed to obtain grand jury subpoenas for medical records. At the time Hilborn obtained the grand jury subpoena form he was aware of no information or evidence to show either (1) that Petitioner had been drinking prior to the accident or was intoxicated at the time of the accident or (2) that Petitioner's medical records contained a blood-alcohol test result or anything relevant to the issue of whether Petitioner was intoxicated at the time of the accident. Hilborn obtained the grand jury subpoena form to obtain Petitioner's medical records for the purpose of his personal accident investigation: "Just to determine whether there was anything there or not."

Hilborn subsequently used the grand jury subpoena form to seize a copy of all of Petitioner's medical records from the medical records custodian at the hospital where she was treated after the May 6, 1994 accident. Hilborn's subsequent search of the copies of Petitioner's medical records he obtained after seizure of same revealed a blood-alcohol test result showing Petitioner's blood alcohol level at .135, which was above the Texas standard of .10 for the purpose of driving while intoxicated. The blood-alcohol test result is the only evidence in possession of the State of Texas to show Petitioner was intoxicated at the time of the accident. On May 15, 1994, Hilborn filed a complaint against Petitioner charging her with involuntary manslaughter in connection with the death of Judy Brown based solely upon the blood-alcohol test result found in Petitioner's medical records. Hilborn published her blood-alcohol test result in the complaint he filed against Petitioner, and a newspaper article mentioning the test result subsequently appeared a few days later in a local newspaper article about the accident, showing no compliance with Texas law regarding grand jury secrecy. A Harris County grand jury different from that set out in the grand jury subpoena form used by Hilborn subsequently indicted Petitioner for the offense on November 18, 1994. No grand jury actually investigated the case before that date.

Uncontroverted evidence at the suppression hearing, including testimony from Andy Tobias, head of the Harris County District Attorney's Grand Jury Division, established and the 183rd District Court found the following regarding the issuance of the grand jury subpoena form (Appendix C, Findings of Fact, 11a-28a, and Section II, 28a-36a, *infra*). The grand jury subpoena form was issued as part of an ongoing unlawful scheme or pretext whereby the Harris County District Attorney's Office routinely and systematically gives grand jury subpoena forms to law enforcement agents from any of the 80 or so law enforcement agencies in Harris County, Texas to enable said law enforcement agents to seize or obtain evidence for the purpose of their personal investigation of crimes and not in connection with any grand jury investigation. The grand jury subpoena forms are issued in this regard by any assistant district attorney in Harris County, Texas without any requirement of a showing of preliminary facts to establish probable cause, reasonable suspicion, or any other recognized legal standard through affidavit or otherwise. No neutral detached magistrate or judicial officer ever determines probable cause for issuance of these grand jury subpoena forms. The grand jury subpoena forms are issued in connection with the scheme to enable law enforcement agents to seize evidence in circumstances where they lack probable cause to obtain a search warrant. The unlawful scheme exists for the purpose of enabling law enforcement officials to violate the search warrant requirements of the Fourth and Fourteenth Amendments as well as various provisions of Texas law, and is accordingly violative of same.

The 183rd District Court additionally found the following concerning the issuance of the particular grand jury subpoena form in the instant case. The grand jury subpoena form was not issued upon the request of an attorney representing the state before a grand jury or the foreperson of a grand jury, and its issuance violated Article 20.10 of the Texas Code of Criminal Procedure for that reason (Appendix C, Section II, Findings of Fact No. 7, 28a-36a, and Conclusions of Law, and Section IV, 38a-40a, *infra)*. The issuance of the grand jury subpoena form additionally violated Article 20.11, §1 of the Texas Code of Criminal Procedure as a grand jury subpoena for an out-of-county witness can only issue by a district court on an application showing materiality of the testimony sought. (Appendix C, Section IV, 38a-40a, *infra*). Deputy Hilborn's seizure of Petitioner's medical records through use of the grand jury subpoena form violated Article 24.04 of the Texas Code of Criminal Procedure as an officer serving a grand jury subpoena in Texas is not lawfully authorized to seize or obtain evidence while serving same. (Appendix C, Section III, 36a-38a *infra*). The grand jury subpoena form used by Deputy Hilborn in the instant case (Appendix M, 123a *infra*) can in no way be viewed as a lawfully issued or legitimate grand jury subpoena for the foregoing reasons.[1]

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[1] Courts have recognized various restrictions on the use of lawfully issued grand jury subpoenas in various contexts. A grand jury subpoena may not be used for a fishing expedition, and may issue only on the basis of a reasonable possibility that information relevant to a grand jury's investigation will be produced. *United States v. R. Enterprises, Inc.*, 498 U.S. 292, 299-301 (1991). A grand jury subpoena is not a substitute for a search warrant to seize evidence. *United States v. Hilton*, 534 F.2d 556, 565 (3rd Cir. 1976). Prosecutors may not use a grand jury subpoena to gather evidence without participation of a grand jury. *In Re Melvin*, 546 F.2d 1, 4-5 (1st Cir. 1976). Grand jury subpoenas may not be used for the sole or dominant purpose of preparing for trial. *United States v. Salameh*, 152 F.3d 88, 109 (2nd Cir. 1998). A valid grand jury subpoena

The trial court ordered suppression of Petitioner's medical records, blood-alcohol test result contained therein, and any other evidence obtained thereby (Appendix B, 8a-10a, *infra*) based upon its determination that the seizure and subsequent search of Petitioner's medical records violated the Fourth and Fourteenth Amendments to the United States Constitution among other laws. (Appendix C, Section II, 28a-36a, and Sections VI and VII, 42a-44a, *infra*).

Federal Questions Timely Raised in the Courts Below

As to Question No. 1 presented for review herein, Petitioner contended in a written pretrial motion to suppress evidence entitled "Motion to Suppress Medical Records Evidence" (Appendix I, Sections I, II, and VI, 79a-85a, *infra*) that the warrantless seizure and subsequent search of her medical records leading to discovery of her blood-alcohol test result therein was unreasonable and unlawful in violation of the Fourth and Fourteenth Amendments, among other laws. Petitioner specifically alleged that she had a reasonable expectation of privacy in her medical records in her motion to suppress. (Appendix I, 78a-90a, *infra*) ("Defendant has a reasonable expectation of privacy in her medical records in connection with her medical treatment resulting from the automobile accident on May 6, 1994,..."). Petitioner was a minor at the time of the accident and her subjective expectation of privacy was shown at the evidentiary hearing on the motion to suppress evidence through the testimony of her mother and managing conservator, Joan Burleson, who signed the consent to treatment form on her behalf at the hospital. Burleson's testimony is summarized in the 183rd District Court's findings in this regard. (Appendix C, 27a-28a, *infra*) ("Burleson as Managing Conservator for Conrad expected the medical records of her daughter to be kept confidential pursuant to the terms of the agreement reflected in the medical releases or consent forms in Defendant's Exhibit No. 8."). The 183rd District Court found that

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duces tecum does not confer a power to seize evidence. *Mancusi v. DeForte*, 392 U.S. 364, 370-372 (1968); In *Re Nwamu*, 421 F. Supp. 1361, 1366 (S.D.N.Y. 1976). *See also In Re Grand Jury Subpoena Dated December 10, 1987*, 926 F.2d 847, 854 (9th Cir. 1991) (discussing differences between search warrants and grand jury subpoenas as to seizures of items specified).

Petitioner had a reasonable expectation of privacy in her medical records and blood-alcohol test results based upon various statutes and other materials to which it was referred by Petitioner or otherwise found on its own as are set forth in its findings in the case (Appendix C, 34a, *infra*) ("Jennifer Conrad has a reasonable expectation of privacy in the contents of her medical records at Katy Community Hospital a/k/a Katy Medical Center. The following statutes support the notion that a person, and society generally, has a reasonable expectation of privacy as to contents of medical records:..."). The trial court found that the seizure and subsequent search of Petitioner's medical records violated the Fourth and Fourteenth Amendments, among other laws, (Appendix C, Section II, 28a-36a, and Sections VI and VII, 42a-44a, *infra*), and ordered suppression of the medical records, blood-alcohol test result, and evidence obtained as a result of the unlawful seizure and search. (Appendix B, 8a-10a, *infra*).

The primary contention of the State of Texas at the trial level and on appeal was that Petitioner had no reasonable expectation of privacy in her medical records. The State's contentions on appeal as set forth by the court below in its first opinion were that "(a) there was no abuse of the grand jury subpoena power, (b) appellee [Petitioner] has no reasonable expectation of privacy in her medical records, and (c) the medical records evidence could have been obtained by other means." (Appendix D, 45a, *infra*). These contentions by the State of Texas were rejected initially by the court below (Appendix D, 45a-59a, and Appendix E, 60a-73a, *infra*). The court below subsequently rephrased the State's primary contention to be "appellee [Petitioner] has no reasonable expectation of privacy in her medical records or standing to challenge the underlying grand jury subpoena" and only addressed that issue in its December 11, 1997 "Substituted Opinion" (Appendix A, 1a-6a, *infra*). The court below in its December 11, 1997 decision held that Petitioner, based on the decision in *State v. Hardy*, *supra*, "had no expectation of privacy in any test results showing her blood-alcohol level, and, thus, no standing to challenge the admissibility of that evidence under the Fourth Amendment or the statutes and rules governing grand jury subpoenas." (Appendix A, 5a, *infra*).

As to Question No. 2 presented for review herein, Petitioner contended in Sections I and II of her motion to suppress evidence that her medical and blood-alcohol test result should be suppressed insofar as acquired as a result of an unreasonable seizure in violation of the Fourth Amendments prohibition against unreasonable seizures. (Appendix I, Sections I and II, 79a-83a, *infra*). Petitioner has a possessory interest in her medical records as a matter of Texas law by virtue of the Medical Practice Act, Tex. Rev. Civ. Stat. Ann. art 4495(b), §5.08(j)-(l) (Vernon Supp. 1994) (Appendix K, 109a, *infra*), as it existed in 1994 and presently as subsequently amended (Appendix L, 116a, *infra*), which gives her the right of access to her medical records, the right to control access to her medical records, and the right to sue for unauthorized disclosure of information in her medical records. Petitioner has standing to complain of an unreasonable seizure under the Fourth Amendment because of this possessory interest as will be later discussed. This statute was cited to the 183rd District Court of Harris County, Texas by Petitioner in her motion to suppress (Appendix I, Sections I, II and VIII, 78a-90a, *infra*),thus providing evidence sufficient for a finding of a possessory interest, and was cited by said court in its findings in connection with its determination that petitioner had a reasonable expectation of privacy in her medical records (Appendix C, 34a-36a,, *infra*). The 183rd District Court of Harris County, Texas specifically found the State acquired Petitioner's medical records and blood-alcohol test result as a result of an illegal seizure, implicitly finding standing to complain (Appendix B, 8a-10a, and Appendix C, 34a-36a, *infra*). A question of law is ordinarily addressed on appeal *de novo*. *United States v. Nichols*, 142 F.3d 857, 864-865 (5th Cir. 1998); *State v. Hardy, supra*, 963 S.W.2d at 523. Mixed questions of law and fact are reviewed *de novo*. *Moody v. Johnson*, 139 F.3d 477, 483 (5th Cir. 1998); *State v. Hardy, supra*, 963 S.W.2d at 523. The State of Texas in the instant case never challenged whether Petitioner had a possessory interest in her medical records or blood-alcohol test result at the trial level or on appeal, and has accordingly waived or forfeited the right to challenge whether Petitioner has a possessory interest in this regard as a matter of Texas procedural law. *See State v. Mercado*, 972 S.W.2d 75, 78 (Tex. Crim. App. 1998) ("Therefore we hold that in cases in which the State is the party appealing, the basic principle of appellate jurisprudence that points not argued at trial are deemed to be waived applies equally to the State and the defense."). The seizure standing issue herein was squarely presented to the court below in Petitioner's timely motion for rehearing (Appendix J, Point Number One, 91a-100a, *infra*) and in her substantially identical motion for en banc reconsideration. The motion for rehearing sufficiently raised the issue in the court below as the issue related to the court's disposition of the case. *See Sotelo v. State*, 913 S.W.2d 507, 510 (Tex. Crim. App. 1995). A Texas appellate court reviewing a trial court's order suppressing evidence must affirm same if correct on any theory of law applicable to the case whether or not addressed by the trial court, and even when the trial court gives the wrong reasons for its decisions. *Weatherred v. State*, 975 S.W.2d 323 (Tex. Crim. App. 1998); *Romero v. State*, 800 S.W.2d 539, 543 (Tex. Crim. App. 1990). The court below erroneously refused to address Petitioner's standing to complain of an unreasonable seizure under the Fourth Amendment by overruling Petitioner's motion for rehearing.

Other necessarily included federal questions herein were raised in the opinion and judgment of the court below (Appendix A, 1a-7a, *infra*) and the decision of the Court of Criminal Appeals of Texas in *State v. Hardy*, *supra*, relied upon by the court below.

REASONS FOR GRANTING THE PETITION

The questions presented are important to the administration of criminal justice throughout the United States. The question of whether a person has a legitimate or reasonable expectation of privacy in medical records, including results of tests conducted for the purpose of medical treatment, kept by a hospital concerning the person's medical treatment at the hospital for the purpose of determining whether an unreasonable search has occurred under the Fourth Amendment set forth in Question No. 1 presented for review is a question of national importance which could conceivably affect the expectations of privacy of every citizen. The Court has never directly addressed this question, and for that reason a substantial basis for review exists pursuant to Sup. Ct. Rule 10(c) as the state court below has decided an important question of federal law which has not been, but should be, settled by this Court.

The concept of a legitimate or reasonable expectation of privacy used to determine standing to complain of an unreasonable search under the Fourth Amendment was merged into the question of whether an unreasonable search in violation of the Fourteenth Amendment has occurred in *Rakas v. Illinois*, 439 U.S. 128 (1978). The legitimate expectation of privacy in this regard must be one that society as a whole is prepared to recognize as reasonable. *Rakas*, 439 U.S. at 143 n.12. The question of whether there is a legitimate expectation of privacy in an area must be resolved by reference to "a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society." *Rakas*, 439 U.S. at 143 n.12. Ownership, lawful possession, or the right to control property will in all likelihood cause a person to have a legitimate or reasonable expectation of privacy by virtue of the right to exclude others; however, protected expectations of privacy under the Fourth Amendment need not be based upon an interest in property. *Rakas*, 439 U.S. at 143 n. 12. The proper focus for determining a reasonable expectation of privacy under the Fourth Amendment is on society as a whole in the United States rather than the laws of a particular state or geographic subdivision. *California v. Greenwood*, 486 U.S. 35, 43-44 (1988).

The Court held that a person does not have a legitimate or reasonable expectation of privacy in business records maintained by a third-party bank concerning his bank account in *United States v. Miller*, 425 U.S. 435, 440-446 (1976). The decision in *Miller* is distinguishable from the situation presented herein for several reasons. The Court in *Miller* focused upon the nature of the documents sought to be protected to determine whether there was a legitimate expectation of privacy concerning their contents, and found that negotiable instruments used in commercial transactions which moved through commercial channels generally and other information voluntarily conveyed to the banks and exposed to bank employees in the ordinary course of business were not such as to engender a legitimate expectation of privacy. *Miller*, 425 U.S. at 442-443. The Court also found Congress assumed a lack of any legitimate expectation of privacy in bank records in enacting the Bank Secrecy Act. *Miller*, 425 U.S. at 442-443. The Court also observed in *Miller* it repeatedly has held the Fourth Amendment does not prohibit the government from obtaining information revealed to an ordinary third-party and conveyed by him to the government. *Miller*, 425 U.S. at 442-443. Doctors and hospitals are not ordinary third-parties in this regard as they maintain a fiduciary relationship with their patients and a societally recognized confidential, privileged relationship with patients as will be hereinafter discussed. *See* 61 Am. Jur. 2d, ***Physicians, Surgeons, Etc.*** §166 (1981) (doctors have fiduciary relationship with patients). Doctors can be sued for improper disclosure of patient information. *See* 61 Am. Jur. 2d, ***Physicians, Surgeons, Etc.*** §169 (1981). Moreover, the decision to seek medical treatment for injury or disease cannot realistically be regarded as voluntary, nor can it be viewed as reasonable to expect a person to forego medical attention. *See State v. Hardy, supra*, 963 S.W.2d at 524 (distinguishing *Miller*). Moreover, the holding in *Miller* has not generally been extended to areas involving societally recognized confidential or privileged relationships. *See, e.g., DeMassa v. Nunez*, 770 F.2d 1505, 1508 (9th Cir. 1985) (attorney's clients have legitimate expectation of privacy for Fourth Amendment purposes in client files maintained by attorney).

Collection and testing of bodily specimens such as blood, breath, and urine intrudes upon expectations of privacy that society has long recognized as reasonable and must be deemed searches under the Fourth Amendment. *Skinner v. Railway Labor Executives' Association*, 489 U.S. 602, 616-617 (1989). Judge Keller, who authored the majority opinion in *State v. Hardy, supra*, previously viewed *Skinner* as establishing as a matter of law that a person has a reasonable expectation of privacy in blood and urine tests. *Villarreal v. State*, 935 S.W.2d 134, 146-147 (Tex. Crim. App. 1996) (Keller, J., concurring). The Court of Criminal Appeals of Texas found a reasonable expectation of privacy in a blood sample given by a patient to a hospital for the purpose of treatment in *State v. Comeaux*, 818 S.W.2d 46, 52-53 (Tex. Crim. App. 1991). There is no practical difference or distinction between a sample for a test and a test result. If a person has a reasonable expectation of privacy in blood or urine given to a hospital, it naturally follows that a person normally would have a legitimate or a reasonable expectation of privacy in the test result as to that blood or urine when the test is conducted at a hospital in connection with medical treatment. The court below found "no meaningful distinction between a patient's blood sample and the results of medical tests conducted on it" in its original opinion (Appendix D, 56a, *infra*) and subsequent opinion (Appendix E, 70a *infra*) affirming the suppression order in the instant case. Petitioner submits that ***Skinner*** may be dispositive of the answer to

Question Number One presented for review herein. The decision of the court below conflicts with *Skinner* and merits review within the meaning of Sup. Ct. Rule 10(c) by holding Petitioner has no reasonable expectation of privacy in her blood-alcohol test result contained in the medical records as it decides an important question of federal law in a manner that conflicts with a relevant decision of this Court.

A legitimate expectation of privacy within the meaning of the Fourth Amendment need only be established by reference to "a source outside of the Fourth Amendment" showing a privacy expectation that society is prepared to recognize as reasonable. *Rakas, supra*, 439 U.S. at 143 n.12. Ample evidence exists apart from the Fourth Amendment demonstrating that society as a whole in the United States views an expectation of privacy in medical records to be legitimate or reasonable as will be hereafter discussed.

There appears to be a constitutional right of privacy presumably under the Fourteenth Amendment based upon holdings of federal appellate courts which establishes a legitimate expectation of privacy in medical records. The measure of the constitutional right of privacy extends to two types of privacy interests: (1) the individual interest in avoiding disclosure of personal matters and (2) the interest in independence in making certain kinds of important decisions. *Whalen v. Roe*, 429 U.S. 589, 598-600 (1977). Privacy in medical records implicates both privacy interests in this regard. An individual has a privacy interest in avoiding disclosure of personal matters contained in medical records, and has an interest in making decisions concerning medical treatment without fear from unreasonable intrusion by government. Federal appellate courts have recognized that a person's medical records are in a constitutionally protected sphere and are included in a constitutional right to privacy apart from the Fourth Amendment. *See, e.g., McDonnell v. United States*, 4 F.3d 1227, 1253 (3rd Cir. 1993) ("It is beyond dispute that an individual has a substantial privacy interest in his or her medical records."); *In Re Search Warrant (Sealed)*, 810 F.2d 67, 71 (3rd Cir. 1987) (recognizing that medical records are in a constitutionally protected sphere, and a privacy right exists and is applicable to compelled disclosure of medical records); *United States v. Lindstrom*, 698 F.2d 1154, 1167 (11th Cir. 1983) (recognizing general validity of privacy interest of patient in confidentiality extending to medical records and societal interest in encouraging free flow of information between patient and psychotherapist, but holding this must yield to paramount interest of defense to cross examine); *United States v. Westinghouse Electric Corp.*, 638 F.2d 570, 577 (3rd Cir. 1980) ("There can be no question that an employee's medical records, which may contain intimate facts of a personal nature, are well within the ambit of materials entitled to privacy protection."). The foregoing cases have applied a balancing test performed by a judicial officer to determine whether the privacy interest is outweighed by legitimate interests in securing the information contained therein. *See, e.g.*, *In Re Search Warrant (Sealed)*, *supra*, 810 F.2d at 71-73. The foregoing cases establish that medical records fall within a constitutionally protected zone of privacy apart from the Fourth Amendment sufficient to establish a legitimate expectation of privacy in medical records for the purpose of whether there has been a search protected by the Fourth Amendment.

Additional compelling evidence that society as a whole recognizes a legitimate expectation of privacy in medical records and information contained therein is the fact that a majority of the states have a physician-patient privilege. *See* 3 Weinstein's Federal Evidence 2nd Ed., Ch. 514, Doctor-Patient Privilege §514.11 (Matthew Bender 1998) (about three-fourths of states have privilege in some form and no state has repealed privilege after adoption). Wigmore suggests roughly two-thirds of the states have a physician-patient privilege. 8 Wigmore, Evidence §2380 (McNaughton Rev. 1961 and Supp. 1998) (listing states with physician-patient privileges). The physician-patient privilege generally applies to hospital records where it exists. *See* Wanda Ellen Wakefield, Annotation, *Physician-Patient Privilege as Extending to Patient's Medical or Hospital Records*, 10 A.L.R. 4th 552, 557 (1981); 81 Am. Jur. 2d, *Witnesses* §474 (1992). Texas has a statutory physician-patient embodied in the Medical Practice Act, Article 4495b, §§5.08(a)-(f) of the Texas Revised Civil Statutes in effect at the time of the incident in the instant case

(Appendix K, 109a *infra*) and presently (Appendix L, 116a, *infra*).[2] Of course, the existence of an evidentiary privilege under a particular state's laws is not determinative of whether a person has a legitimate expectation of privacy in matter covered thereby as to United States society as a whole. *See Greenwood, supra*, 486 U.S. at 43-44. Nevertheless, the fact that a substantial majority of the states have such a privilege is strong evidence that society as a whole recognizes a legitimate expectation of privacy in the privileged area. It has been recognized additionally that medical ethics demand confidentiality in the physician-patient relationship. *Richardson v. State*, 865 S.W.2d 944, 953 n.7 (Tex. Crim. App. 1993). Medical ethics would thus provide a basis apart from the Fourth Amendment for finding a legitimate expectation of privacy in medical records.

Additional evidence that there is a legitimate expectation of privacy in medical records arises from various federal statutes addressing confidentiality of medical records in limited instances, including in connection with drug and alcohol prevention programs and mental health research. *See generally* 3 Weinstein's Federal Evidence 2nd Ed., Chapter 514, Doctor-Patient Privilege §514.04 (Matthew Bender 1998). The Privacy Protection Act, 42 U.S.C. §2000aa-11(a) (1994), recognizes special concern for privacy interests in known confidential relationships such as doctor and patient. *See also* 42 C.F.R. §401.126(b)(1) (1997) (exempting identity of patient and practitioner from disclosure).

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[2] The Court of Criminal Appeals of Texas does not recognize the statutory physician-patient privilege in Article 4495(b), §5.08 in criminal cases based upon the notion that it was given authority to repeal the act as to evidentiary privileges in connection with promulgation of rules of evidence for criminal proceedings through Tex. Rev. Civ. Stat. Ann. art. 1811f, §9 (Vernon Supp. 1999). *State v. Hardy, supra*, 963 S.W.2d at 519-523. The Court of Criminal Appeals does not possess authority under the Texas Constitution to repeal any statute, and its purported repeal of the Medical Practice Act as to evidentiary privileges violates the separation of powers doctrine in Tex. Const. art. II, §1 as the Legislature has never been authorized by an express provision of the Texas Constitution to empower said court to repeal statutes. *Cf. Meshell v. State*, 739 S.W.2d 246, 252 (Tex. Crim. App. 1987). The statute has never been repealed and continues to be amended by the Texas Legislature. *See Hardy*, 963 S.W.2d at 531 (Baird, J., dissenting to denial of motion for rehearing); Appendix K, 109a, and Appendix L, 116a, *infra*. The court below erroneously refused to address this issue and other issues of Texas law raised by Petitioner in her motion to suppress which were ruled on by the 183rd District Court. The Court of Criminal Appeals nevertheless recognizes the Medical Practice Act is a valid, operative statute for all other purposes, including a statutory duty of confidentiality imposed on doctors. See *Richardson v. State*, 865 S.W.2d 944, 953 n.7 (Tex. Crim. App. 1993). See also *State v. Comeaux, supra*, 818 S.W.2d at 52-53 ("Additionally, we recognize society's regard for this expectation, as evidenced by the Texas Medical Practice Act cited above.").

The highest courts of several states are divided on the question of whether a person has a legitimate or reasonable expectation of privacy in medical records and/or blood-alcohol test results contained therein thus providing a basis for review under Sup. Ct. Rule 10(b) because of conflict among state courts of last resort on the question. The Supreme Court of Pennsylvania found that the appellant had a reasonable expectation of privacy in his medical records subject only to reasonable searches and seizures in *Commonwealth v. Riedel*, 651 A.2d 135, 138-139 (Pa. 1994) (holding the warrantless search of the appellant's medical records leading to recovery of the blood test result was reasonable where the officer had probable cause to request a blood test under a state statute). The Supreme Court of Michigan held that the appellants had a subjective expectation of privacy in blood test results but not one society was willing to recognize as reasonable under the circumstances since there was no state involvement in the withdrawal and testing of the blood in *People v. Perlos*, 462 N.W.2d 310, 314-315 (Mich. 1990). The appellate court there relied in part on *United States v. Miller, supra*, and found that there was no reasonable expectation of privacy in blood-alcohol test result under a Michigan statute creating an exception to the state's statutory physician-patient privilege granting prosecutors access to test results along with the state's implied consent laws. *Perlos*, 462 N.W.2d at 319-321. The Court of Criminal Appeals of Alabama held in partial reliance in *United States v. Miller, supra*, that any expectation of privacy the appellant had in hospital records containing the results of his blood-alcohol test was unreasonable in view of the absence of a general physician-patient privilege in that state, the state's implied consent law, the state's statutes granting prosecutors access to such records, and society's strong interest in curtailing drunken driving in *Tims v. State*, 711 So.2d 1118, 1123 (Ala. Crim. App. 1997). The Court of

Criminal Appeals of Tennessee held the appellant had no reasonable expectation of privacy concerning medical records showing he had gonorrhea in *State v. Fears*, 659 S.W.2d 370, 375-376 (Tenn. Crim. App. 1983), *cert. denied*, 465 U.S. 1082 (1984), based upon *United States v. Miller, supra*, and the lack of a physician-patient privilege in Tennessee.

The decisions in *Perlos*, *Tims*, and *Fears, supra*, to the extent based on *United States v. Miller, supra*, were incorrectly decided as *Miller* is distinguishable and has not been extended to apply to recognized privileged or confidential relationships as heretofore discussed. Said decisions are also incorrectly decided under and in conflict with *California v. Greenwood, supra*, 486 U.S. at 43-44, insofar as they base their Fourth Amendment legitimate expectation of privacy determination solely upon their own state's laws rather than on the expectations of society as a whole. This Court should accordingly grant certiorari pursuant to Sup. Ct. Rule 10(b) insofar as the highest courts of Michigan, Alabama, and Tennessee and the court below have decided an important federal question in a manner conflicting with the decision of the highest court of Pennsylvania. Certiorari should also be granted pursuant to Sup. Ct. Rule 10(c) insofar as *Perlos*, *Tims*, and *Fears, supra*, were decided in a manner conflicting with *California v. Greenwood, supra*, by focusing the Fourth Amendment legitimate expectation of privacy determination solely on their own state's laws. These state cases also conflict with the federal appellate court cases heretofore cited on the issue of a legitimate expectation of privacy in medical records providing an additional reason that certiorari should be granted pursuant to Sup. Ct. Rule 10(b).

The Court of Criminal Appeals of Texas did not reach the question of whether a person has a reasonable expectation of privacy in medical records generally, but held that any expectation of privacy society may have in medical records is not sufficiently strong to warrant protection of a blood-alcohol test result from tests taken by hospital personnel for medical purposes after a traffic accident in *State v. Hardy, supra*, 963 S.W.2d at 527. The four dissenting judges expressed the view that a reasonable expectation of privacy exists in the test results of a person's blood, and that a search warrant was required instead of a grand jury subpoena. *Hardy*, 963 S.W.2d at 527-531 (Price, J., dissenting).

The majority decision in *Hardy* is otherwise erroneous for reasons which will be hereinafter discussed. The court below in the instant case relied solely upon *State v. Hardy*, *supra*, in holding Petitioner had no reasonable expectation of privacy in the blood-alcohol test result discovered in the search of her medical records, but sustained the trial court's order suppressing her medical records generally, which included HIV test and pregnancy test results. (Appendix A, 5a, *infra*). The decision by the court below is self-contradictory in this regard because if Petitioner has a reasonable expectation of privacy in her medical records she necessarily has a reasonable expectation of privacy in a test result contained therein.

Additionally, the court below improperly focused its reasonable expectation of privacy determination upon the product of the search (the blood-alcohol test result) rather than the area of the search, which under the circumstances in the instant case would be the hospital's medical records. The proper focus of the reasonable expectation of privacy determination in the context of the Fourth Amendment is upon the expectation of privacy invaded and not the item seized. The Fourth Amendment prohibition against unreasonable searches protects people and not places from invasion of a legitimate expectation of privacy. *Katz v. United States*, 389 U.S. 347, 351-352 (1967). Frequently, the expectation of privacy relates to the place of the search. *See, e.g.*, *Minnesota v. Olsen*, 495 U.S. 91, 96-100 (1990) (home); *Florida v. Riley*, 488 U.S. 445, 449-452 (1989) (areas open to view by aerial surveillance); *Hudson v. Palmer*, 468 U.S. 517, 525-528 (1984) (prison cell); *Oliver v. United States*, 466 U.S. 170, 178-181 (1984) (open fields and curtilage around home); *Rakas v. Illinois*, *supra*, 439 U.S. at 129-130 (automobile of another). However, the Fourth Amendment is not restricted merely to the place of the search, but protects "from unreasonable governmental intrusions into any area in which [the citizen] has a reasonable expectation of privacy." *Winston v. Lee*, 470 U.S. 753, 767 (1985). The protected area in the instant case is Petitioner's medical records and not merely the blood-alcohol test result contained therein. Nevertheless, the blood-alcohol test result may in itself be a protected area. It is therefore submitted that the decision of the court below in the instant case and that of the Court of Criminal Appeals of Texas in *State v. Hardy*, *supra*, relied upon therein, are clearly erroneous by focusing upon the item seized rather than addressing whether the item came from or was in itself a constitutionally protected area.

Question No. 2 presented for review herein presents the question of whether suppression of evidence is required by the Fourth Amendment exclusionary rule where the person has a possessory interest in the property seized and thus standing to complain of an unreasonable seizure under the Fourth Amendment regardless of whether the person has a reasonable expectation of privacy in the place searched or item seized for the purpose of a Fourth Amendment search. In the instant case, the 183rd District Court found that Petitioner's medical records and blood-alcohol test result were unlawfully *seized* in violation of the Fourth Amendment. (Appendix C, Section 2, 28a-36a, and Appendix B, 8a-10a, *infra*). The instant case is different from the ordinary case in that there was a seizure followed by a search rather than a search followed by a seizure. In the ordinary case, the Fourth Amendment issue is normally resolved on the basis of whether there is an unreasonable search as opposed to whether there is an unreasonable seizure, and many appellate courts and lawyers fail to perceive a difference between standing to complain of a seizure as opposed to standing to complain of a search. Typically a possessory interest in property is viewed as a consideration of whether a person has a reasonable expectation of privacy rather than a separate standing component. *See, e.g., Villarreal, supra*, 935 S.W.2d at 138 (possessory interest is a factor relevant to reasonable expection of privacy). The Court of Criminal Appeals of Texas recognized a distinction between a reasonable expectation of privacy and a possessory interest in *Chapa v. State*, 729 S.W.2d 723, 725 n.1 (Tex. Crim. App. 1987), but its decisions in the area of search and seizure are typically resolved on the basis of reasonable expectation of privacy and thus search standing. *See, e.g., Flores v. State*, 871 S.W.2d 714, 720 (Tex. Crim. App. 1993).

A *search* occurs under the Fourth Amendment when an expectation of privacy that society is prepared to recognize as reasonable is infringed, whereas a *seizure* occurs when there is some meaningful interference with an individual's possessory interest in property. *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). Standing for a seizure under the Fourth Amendment is thus whether a person has a possessory interest in the item or thing seized. The Court has not defined a possessory interest in this context. Presumably a possessory interest involves not only ownership of property but also rights to have access to or possession of property, to control property, or to exclude others from property. *See Rakas ,supra*, 439 U.S. at 143 n.12.

A determination of a possessory interest in property must necessarily refer to the laws of the state in which a seizure occurs or in which the possessory interest arises. Petitioner's medical records are made confidential by statute in Texas, and Petitioner has the right to access to her medical records and the right to control access thereto by statute. Tex. Rev. Civ. Stat. art. 4495b, §§5.08(j) and (k) (Vernon Supp. 1994). (Appendix K, 109a, *infra*). Petitioner also has a statutory right to bring a lawsuit for injunctive relief and may seek civil damages for improper release of confidential information in medical records under Section 5.08(l) of said statute. *See Cassingham v. Lutheran Sunburst Health Service*, 748 S.W.2d 589, 591 (Tex. App. - San Antonio 1988, no writ) (discussing statutory physician-patient privilege and cause of action for improper release of medical information, and observing hospital must under Section 5.08 protect records from unauthorized disclosure). A person may also bring an action for improper release of HIV test results contained in medical records. Tex. Health and Safety Code Ann. §§81.103(j) (establishing criminal offense for improper disclosure of test result) and 81.104 (Vernon 1992). Petitioner accordingly has a possessory interest in her medical records as a matter of law by virtue of these Texas statutes. The statutes in question were cited to the 183rd District Court and referred to by said court in its findings of fact and conclusions of law (Appendix C, 34a, *infra*). The 183rd District Court specifically held that Petitioner's medical records were obtained as a result of an unreasonable *seizure* in violation of the Fourth Amendment, implictly finding standing to complain (Appendix B, 8a-10a, and Appendix C, Section II, 28a-34a, *infra*). The State of Texas never challenged whether Petitioner has a possessory interest in her medical records at the trial level or on appeal, challenging only whether she had a reasonable expectation of privacy in her medical records, and has accordingly waived or forfeited its right to challenge Petitioner's standing to contest an unlawful seizure. *See State v. Mercado*, 972 S.W.2d 75, 78 (Tex. Crim. App. 1998) (holding that points not argued at trial level by State are deemed waived where State appeals). An appellate court in Texas is required to affirm a trial court's order suppressing evidence if suppression of the evidence is correct on any theory of law applicable to the case whether or not addressed by the trial court and even when the trial court gives the wrong reasons for its decision. *Weatherred, supra*, 975 S.W.2d at 323; *Romero, supra*, 800 S.W.2d at 543. A Texas appellate court must address every issue raised and necessary to the final disposition of a case as well. *Cardwell v. State*, 881 S.W.2d 712, 713 (Tex. Crim. App. 1994). Petitioner directly pointed out to the court below that the 183rd District Court's suppression order should be affirmed regardless of whether she had a reasonable expectation of privacy in her medical records or blood-alcohol test result because she had a possessory interest in her medical records as a matter of Texas law and thus standing to complain of the unlawful seizure of same in her motion for rehearing in the court below. (Appendix J, Point Number One, 93a-100a, *infra*). The court below erroneously failed to consider whether the trial court's suppression order as to Petitioner's blood-alcohol test result should have been affirmed on the basis of an unlawful seizure in violation of the Fourth Amendment.

A seizure of personal property is per se unreasonable within the meaning within the Fourth Amendment unless accomplished pursuant to a judicial warrant issued upon probable cause particularly describing the items to be seized. *United States v. Place*, 462 U.S. 696, 701 (1983) (reversing conviction because of unreasonable seizure where search lawful); *Mincey v. Arizona*, 437 U.S. 385, 390-391 (1978). Seizures of property are subject to the Fourth Amendment scrutiny even though no search within the Fourth Amendment has taken place. *Soldal v. Cook County*, 506 U.S. 56, 68 (1992). It is accordingly clear that the appellate court below erroneously reversed the 183rd District Court's order suppressing Petitioner's blood-alcohol test result because she had standing to challenge the unreasonable warrantless seizure of her medical records and blood-alcohol test result regardless of whether she had a reasonable expectation of privacy in same. The action of the court below overruling Petitioner's motion for rehearing in the instant case disregards the decisions in *Soldal v. Cook County*, *United States v. Place*, and *United States v. Jacobsen, supra*, as to the law with respect to standing to complain of unreasonable seizures under the Fourth Amendment, and thus ignores an important federal question in a way conflicting with the decisions of this Court by failing to address the seizure issues presented in violation of Petitioner's rights under the Fourth and Fourteenth Amendments.

A necessarily included question herein is whether the highest court of a state has authority to arbitrarily decree exemptions from the Fourth Amendment exclusionary rule. The Court of Criminal Appeals of Texas held, without addressing the question of whether a person has a reasonable expectation of privacy in medical records kept by a hospital generally, that any interest society may have in protecting privacy of medical records "is not sufficiently strong to require protection of blood-alcohol test results from tests taken by hospital personnel solely for medical purposes after a traffic accident." *State v. Hardy, supra*, 963 S.W.2d at 527. The holding in *State v. Hardy, supra*, was followed by the court below in reversing the trial court's suppression order as to Petitioner's blood-alcohol test result contained within her medical records. The effect of the *Hardy* decision as followed by the court below is that blood-alcohol test results are not protected under the Fourth Amendment in Texas regardless of how they are seized or acquired by law enforcement officials.

The Fourth Amendment exclusionary rule requires that any evidence obtained from a defendant by a search or seizure in violation of the defendant's Fourth Amendment rights must be suppressed. *Alderman v. United States*, 394 U.S. 165, 171 (1969); *Weeks v. United States*, 232 U.S. 383, 398-399 (1914). Fruits of such evidence also must be suppressed. *Wong Sun v. United States*, 371 U.S. 471,487-488 (1963); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 391-392 (1920). The Fourth Amendment exclusionary rule is applicable to the states through the Fourteenth Amendment. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) ("We hold that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in state court."). Analysis of whether society recognizes a legitimate or reasonable expectation of privacy in the area searched is necessary to determine whether there has been an unreasonable search in violation of the Fourth Amendment. This is a threshold requirement and society either recognizes or does not recognize a legitimate expectation of privacy in the area. It is not measured by a degree formulation. The Court of Criminal

Appeals of Texas overlooked this necessary analytical determination in *State v. Hardy, supra*, by not determining whether society recognizes a legitimate expectation of privacy in a hospital blood-alcohol test result. Instead, said court, in utter disregard of legitimate societal expectations, simply decreed that a blood-alcohol test result in the appellant's medical records would not be protected under the Fourth Amendment. The court below relied solely upon *State v. Hardy, supra*, in holding Petitioner had no legitimate expectation of privacy in her blood-alcohol test result, and both decisions conflict with *Mapp v. Ohio, supra*, and *Rakas v. Illinois, supra*, by exempting blood-alcohol test results from application of the Fourth Amendment exclusionary rule and thus decide an important federal question in conflict with relevant decisions of this Court heretofore cited regarding the scope of the Fourth Amendment exclusionary rule meriting review under Sup. Ct. Rule 10(c).

Certiorari should be granted in the instant case in order to stop the outrageous scheme found to exist by the 183rd District Court whereby the Harris County District Attorney's Office routinely and systematically issues grand jury subpoena forms to members of the county's 80 or so law enforcement agencies in the absence of a lawful grand jury investigation for the purpose of enabling seizure of evidence for their own personal investigations without a determination of probable cause by a neutral and detached magistrate or other judicial officer. The scheme allows the law enforcement agents to thwart and subvert the search warrant requirements of the Fourth and Fourteenth Amendments and decisions of this Court interpreting same. The expectations of privacy of millions of United States citizens residing in Harris County, Texas are thereby subject to warrantless invasion at any time at the whim of the District Attorney's Office and the police without any judicial determination of probable cause to justify such invasion. The court below, instead of taking action to stop this scheme and its unlawful practices, misrepresented the true facts of the case as found by the 183rd District Court in each of the three opinions it issued in the instant case in order that the seizure of Petitioner's medical records by Deputy Hilborn might appear to have been pursuant to lawful process. The Court of Criminal Appeals of Texas took no action to stop the ongoing unlawful Fourth and Fourteenth Amendment violations pursuant to the scheme by refusing Petitioner's petition for discretionary review.

The action of the Texas appellate courts in this regard in the instant case does nothing but reinforce the scheme. Requiring a search warrant to seize a person's medical records cannot hamper legitimate law enforcement investigations in any way. Petitioner prays that this Court will take action to abolish this patently unlawful scheme before it spreads to other areas.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Opinion of May 22, 1997 Withdrawn and Substitute Opinion filed December 11, 1997.

In The
Fourteenth Court of Appeals

NO. 14-96-00167-CR

THE STATE OF TEXAS, Appellant
V.
JENNIFER MARIE CONRAD, Appellee

On Appeal from the 183rd District Court
Harris County, Texas
Trial Court Cause No. 94-13612

SUBSTITUTED OPINION

The opinion issued in this case on May 22, 1997 is withdrawn and the following opinion issued in its place.

The State of Texas appeals the trial court's order granting Jennifer Marie Conrad's motion to suppress evidence of her medical records on the grounds that (a) there was no abuse of grand jury subpoena power, (b) appellee has no reasonable expectation of privacy in her medical records or standing to challenge the underlying grand jury subpoena, and (c) the evidence could legally be obtained by other means. We affirm in part and reverse and remand in part.

Background

On the evening of May 6, 1994, Harris County Sheriff's Deputy Hilborn investigated a one car accident in which appellee had lost control of and flipped the car she was driving. He interviewed no witnesses at the accident scene but found several cold, "sweaty" bottles of beer there.

After finishing his work at the accident scene, Hilborn went to the Katy Medical Center, where appellee had been taken. At the time he talked to appellee at the hospital, she appeared injured and confused but not intoxicated. Hilborn did not get close enough to her to determine if there was an odor of alcohol on her breath. Nor did he ask appellee to submit to any blood, urine or breath test to determine if she was intoxicated.

On May 9, after learning that a passenger in appellee's car had died, Hilborn obtained a grand jury subpoena from the Harris County District Attorney's office[1] to secure a copy of the medical records of appellee's treatment at Katy Medical Center. The medical records indicated that appellee's blood alcohol content was 0.135 on May 6 after the accident. After Hilborn turned the records over to the District Attorney's office, appellee was indicted for involuntary manslaughter. She filed a pretrial motion to suppress the medical records, which the trial court granted by written order dated January 12, 1996. In its sole point of error, the State asserts that the trial court erred in granting appellee's motion to suppress.

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[1] Although the subpoena reflected that it issued from the grand jury for the 176th District Court, Hilborn testified that it was issued from the Intake Division of the District Attorney's Office at a time when no grand jury was empaneled.

Standard of Review

When a defendant seeks to suppress evidence on the basis of a Fourth Amendment violation, he has the initial burden to produce evidence that defeats the presumption of proper police conduct and shifts the burden of proof to the State. *Russell v. State*, 717 S.W.2d 7,9 (Tex. Crim. App. 1986). A defendant meets this burden of proof by establishing that a search or seizure has occurred without a warrant. *Id.* Once a defendant establishes that a warrantless search or seizure has occurred, the State must either (a) produce evidence of a warrant, shifting the burden back to the defendant to show its invalidity; or (b) prove the reasonableness of the search or seizure. *Id.* at 9-10.

Appellate courts should afford almost total deference to a trial court's determination of historical facts which the record supports, especially when the trial court's findings are based on an evaluation of credibility and demeanor. *Guzman v. State*, No. 190-94, slip op. at 5 (Tex. Crim.App. 1997). Appellate courts should afford the same amount of deference to trial courts' rulings on "application of law to fact questions," also known as "mixed questions of law and fact," if the resolution of those ultimate issues turns on an evaluation of credibility and demeanor. *Id.* The appellate courts may review *de novo* "mixed questions of law and fact" not falling within this category. *Id.*Thursday,is the determination is one which the trial court is not in an appreciably better position than the reviewing court to make, such as whether an officer had probable cause to seize a suspect under the totality of the circumstances, the reviewing court may independently determine the issue while affording deference to the trial court's findings on subsidiary factual questions. *Id.* at 3,5.

Reasonable Expectation of Privacy

The State challenges the trial court's finding that appellant had a reasonable expectation of privacy in the portion of her medical records showing test results for her blood alcohol level.

The Fourth Amendment to the United States Constitution provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause." U.S. Const. amend. IV. The protection against unreasonable searches and seizures under Article I, Section 9, of the Texas Constitution[2] is at least as extensive as that under the Fourth Amendment. *State v. Comeaux*, 818 S.W.2d 46,49 (Tex.Crim.App. 1991).

The purpose of both the Fourth Amendment and Article I, Section 9, is to safeguard an individual's legitimate expectation of privacy from unreasonable government intrusions. *Villarreal v. State*, 935 S.W.2d 134, 138 (Tex.Crim.App. 1996). An accused has standing under both Constitutional provisions to challenge the admission of evidence obtained by a government intrusion only if he had a legitimate expection of privacy in the place invaded. *Id.*[3] However because the Fourth Amendment protects people rather than areas, its reach is not dependent upon an intrusion into a location or enclosure. *See Katz v. United States*, 389 U.S. 347, 353 (1969). Evidence obtained by searches and seizures which violate the Fourth Amendment is inadmissible in state court. *Mapp v. Ohio* 367 U.S. 643, 655 (1961).

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[2] Article I, Section 9 provides:

> The people shall be secure in their persons, houses, papers and possessions, from all unreasonable searches or seizures, and no warrant to search any place, or to seize any person or thing, shall issue without describing them as near as may be, nor without probable cause, supported by oath or affirmation.

TEX.CONST. art. I,§ 9.

The Court of Criminal Appeals has recently held that an individual has no expectation of privacy in blood-alcohol test results from tests taken by hospital personnel solely for medical purposes after a traffic accident *See Hardy v. State*, No. 1061-94, slip op. at 12-13 (Tex. Crim. App. Nov. 19, 1997)(en banc). Based on that decision, appellee in this case had no expectation of privacy in any test results showing her blood alcohol level, and, thus, no standing to challenge the admissibility of that evidence under the Fourth Amendment or the statutes and rules governing the use of grand jury subpoenas.[4] Therefore, the trial court erred in suppressing that evidence, and we need not reach the State's other grounds for challenging the suppression order. Accordingly, the trial court's order is reversed and remanded as to any test results showing appellee's blood alcohol level, and affirmed as to the remainder of the medical records.

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[3] *See Rakas v. Illinois*, 439 U.S. 128, 143 (1978) ("[C]apacity to claim the protection of the Fourth Amendment depends not upon a property right in the invaded place but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place.").

[4] *See Fuller v. State*, 829 S.W.2d 191, 201-02 (Tex.Crim.App. 1992) (reiterating that defendant does not have standing to suppress, under article 38.23(a) of the Texas Code of Criminal Procedure, evidence obtained illegally from a third party).

/s/ Richard H. Edelman
Justice

Judgment rendered and Opinion filed December 11, 1997.

Panel consists of Justices Lee, Amidei, and Edelman.

Do Not Publish —Tex.R.App.P.47.3(b)

DECEMBER 11, 1997

JUDGMENT

THE FOURTEENTH COURT OF APPEALS

THE STATE OF TEXAS, Appellant

NO. 14-96-00167-CR V.

JENNIFER MARIE CONRAD, Appellee

This cause was heard on the transcript of the record of the court below. The record reveals error in judgment. The Court orders the judgement **REVERSED** and the cause **REMANDED** for further proceedings in accordance with its opinion, and orders this decision certified below for observance.

APPENDIX B

NO. 94-13612

THE STATE OF TEXAS § IN THE DISTRICT
§ COURT OF HARRIS
V. § COUNTY, TEXAS
§ 183RD JUDICIAL
JENNIFER CONRAD § DISTRICT

ORDER GRANTING DEFENDANT'S MOTION TO SUPPRESS MEDICAL RECORDS EVIDENCE

On March 27-28, 1995 came on to be heard the Motion to Suppress Medical Records Evidence of defendant wherein she contends for several reasons that the court should suppress evidence of her medical records resulting from her treatment for injuries at Katy Community Hospital a/k/a/ Katy Medical Center on May 6, 1994 and all evidence obtained therefrom as a result of the seizure of copies of said records on or about May 15, 1994 by Harris County Sheriffs' Deputy James Hilborn through a grand jury subpoena. The court in determining the merits of defendant's contentions has considered her Motion to Suppress Medical Records Evidence; Trial Brief in Support of Medical Records Evidence; Defendant's First Supplemental Trial Brief in Support of Motion to Suppress Medical Records Evidence; Defendant's Second Supplemental Trial Brief in Support of Motion to Suppress Medical Records Evidence; and other materials and cases supplied by counsel for defendant. The court has also considered the States's Reply Brief to defendant's Motion to Suppress Medical Records and other cases and materials supplied by counsel of the State. The court has also considered the oral arguments of counsel heard on September 20, 1995, and the transcribed Statement of Facts and exhibits from the hearing on the motion to suppress The court has also considered Defendant's third Supplemental Trial Brief supplied by the Defendant. The court believes that the Motion to Suppress Medical Records Evidence should be granted based on defendant's assertions that her medical records were unlawfully and illegally seized contained in the following sections of her Motion to Suppress Medical Records Evidence: Section II, pp. 3-7; Section III, pp. 7-8; Section IV, pp. 9-10; Section V, p. 10; Section VI, pp. 10-11; and Section VII, p. 11. The court overrules defendant's assertions in Section VIII, pp. 11-14, of her Motion to Suppress Medical Records Evidence. The court ~~has prepared~~ *is to prepare* and file~~d~~ Findings of Fact and Conclusions of Law setting forth the reasons for the court's action in this regard which ~~have been~~ *will be* filed with the clerk -- *Tuesday 1/16/96*. It is accordingly ~~hereby~~ the Motion To Suppress is hereby Granted.

ORDERED, ADJUDGED, AND DECREED that the defendant's Motion to Suppress Medical Records Evidence is hereby GRANTED. Defendant's medical records seized from Katy Community Hospital a/k/a Katy Medical Center by Harris County Sheriff Deputy James Hilborn on or about May 15, 1994 through use of the grand jury subpoena obtained by him on that date, including all test results for blood alcohol and all evidence of any type whatsoever recovered or discovered by the State as a result of said seizure, are hereby declared inadmissible in evidence and are suppressed. The State shall not attempt to offer any test result or other evidence included in the scope of this order into evidence, and no witness for the State shall comment upon or allude to any evidence included within the scope of this order.

Signed and executed this 12th day of ~~November~~ *January*, 199~~5~~.*6*

/s/
JUDGE PRESIDING

APPENDIX C

NO. 94-13612

THE STATE OF TEXAS	§	IN THE DISTRICT
	§	OF HARRIS
V.	§	COUNTY, TEXAS
	§	
JENNIFER MARIE	§	183RD JUDICIAL
CONRAD	§	DISTRICT

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The court hereby enters the following findings of fact and conclusions of law in connection with its grant of defendant's Motion to Suppress Medical Records Evidence heard by the court on March 27-28, 1995 and argued by counsel before the court on September 20, 1995. The motion to suppress is directed at information obtained by the State, especially blood alcohol test results, from defendant's medical records obtained through use of a grand jury subpoena. The hearing on the motion to suppress was transcribed and a two volume transcript was filed with the court and a copy supplied to the parties by the court reporter. Volume I reflects proceedings on March 27, 1995. Volume II reflects proceedings on March 28, 1995, and contains exhibits offered and admitted into evidence. The court is hereafter listing facts determined from the testimony of each witness and exhibits admitted in connection with the testimony, and will thereafter list the court's relevant findings of fact from all of the evidence and conclusions of law reached by the court as to each ground for suppression of evidence asserted in defendant's Motion to Suppress Medical Records Evidence by reference to the Roman numbered sections in the motion.

FINDINGS OF FACTS

The following facts with respect to each witness who testified at the hearing on the motion to suppress evidence are:

A. TESTIMONY OF JAMES HILBORN (S.F. Vol. pp. 9-58)

1.Deputy James Hilborn was the Harris County Sheriff's Department Deputy and Accident Investigator who investigated the one car accident involving the vehicle driven by Jennifer Conrad on May 6, 1994 at approximately 10:20 p.m. in the 21900 Block of I-10 West in Harris County, Texas, and who during the course of his investigation obtained and executed the grand jury subpoena in question and thereby obtained Conrad's medical records from Katy Community Hospital a/k/a Katy Medical Center where Conrad was treated after the accident. All references to the grand jury subpoena used hereinafter refer to the grand jury subpoena obtained by Hilborn in connection with this case which was admitted into evidence along with the return as Defendant's Exhibit No. 3. (S.F., Vol. II, Exhibits; S.F., Vol. I at p. 46).

2. Hilborn identified Defendant's Exhibit 1 (S.F., Vol II, Exhibits; Admitted at S.F. Vol. I, p. 18) as the complaint he filed against Conrad on June 10, 1994 which sets forth all facts known to him at that time relative to the issue of probable cause for filing involuntary manslaughter charges against Conrad. (S.F. Vol. I, pp. 15-18). The complaint at p.2 states:

> Affiant subpoenaed the medical records of defendant

> concerning her admittance to Katy Community Hospital on May 6, 1994. Affiant read those records and determined the blood alcohol level of defendant on May 6, 1994, after the car accident, was .135.
>
> The subpoena referred to in the above quote is the grand jury subpoena. (S.F., Vol. I, p. 47).

3. Hilborn testified that Katy Medical Center a/k/a Katy Community Hospital is located in Fort Bend County, Texas, and that the accident occurred in Harris County, Texas. (S.F., Vol. I, pp. 21-22).

4. Hilborn said at the scene of the wreck they picked up some cans or bottles of beer among the wreckage along with other items. These were not in the car, but he didn't think they were lying on the roadside because they were cool and sweaty. (S.F., Vol. I,pp. 13-14). The State offered no evidence to show these items came from the car driven by Conrad, which had other passengers, or that Conrad had been drinking at the time of or prior to the accident. (S.F. Vol. I, pp. 48-49).

5. Hilborn did not interview any witnesses at the scene of the accident regarding same. He went to various hospitals attempting to interview those injured in the accident and their parents. He went to Katy Community Hospital a/k/a/ Katy Medical Center to interview Conrad and her parents but did not remember the time he arrived. (S.F., Vol. I, pp. 22-23).

6. Prior to going to the hospital Hilborn had received no

information from anyone to the effect that Conrad may have been drinking prior to or at the time of the accident. The time at which Hilborn arrived at the hospital was at least a couple of hours after the accident. Those injured had been taken from the scene by EMS personnel before Hilborn finished his investigation at the scene. (S.F. Vol. I,pp. 23-26).

7. Hilborn talked to Conrad and her mother at the hospital. He spoke to either a nurse or doctor as to Conrad's condition but does not remember anyone in particular. He only obtained information as to her medical condition in the sense of whether she had any life threatening injuries, and did not ask anything specific other than her medical condition. (S.F., Vol. I, pp. 25-27).

8. Hilborn did not ask Conrad to take any blood, breath, or urine test for blood alcohol for the purpose of determining if she was intoxicated, and did not submit any test refusal form to the Texas Department of Public Safety. (S.F., Vol.I, p. 27).

9. Hilborn testified at the time he interviewed Conrad she appeared to be injured and confused, and did not appear intoxicated. She was in the emergency room and he did not get close enough to her to smell alcohol on her breath or otherwise. (S.F.,Vol. I, P.27).

10. Hilborn subsequent to interviewing Conrad at the hospital up to the time he requested the issuance of the grand jury subpoena did not learn any information from any source that would indicate Conrad was intoxicated prior to or at the time of the accident. (S.F., Vol. I,p.28).

11. Hilborn was contacted by the Medical Examiner's Office on May 9, 1994, and was informed Judy Brown (the deceased named in the indictment) had died. (S.F., Vol. I,p.29).

12. Hilborn on May 15, 1994 requested issuance of the grand jury subpoena from an assistant district attorney in Harris County, Texas. He could not remember who, maybe "Eckerd." (S.F.,Vol.I,p. 29). Hilborn identified Defendant's Exhibit No. 3 (S.F.,Vol II, Exhibits; admitted at S.F., Vol. I, p.46) as the grand jury subpoena he requested and received in connection with this case. (S.F.,Vol.I,p.32). The assistant district attorney filled out the handwriting and signature on page one, and Hilborn filled out the handwriting and signature on page two of the subpoena (the return). Hilborn obtained the grand jury subpoena from the District Attorney's Intake Office. (S.F.,Vol.I, pp. 41-43).

13. Hilborn did not attempt to obtain a search warrant for the medical records of Conrad. He was not under the impression he needed a search warrant at the time. He was not aware of any information as to contents of Conrad's medical records prior to requesting the issuance of the grand jury subpoena that would indicate there was any blood or alcohol test or test result present in the records, as to blood, breath, or urine specimens. When asked if it would be fair to say that the did not have probable cause to request a search warrant at that time, Hilborn stated: "Well, I didn't request a search warrant." (S.F.,Vol. I,pp.32-34)

14. Hilborn took the grand jury subpoena and delivered it to the Medical Records Custodian, Angelique Leal,

of the Katy Community Hospital a/k/a/ Katy Medical Center, where Conrad was treated after the accident, and spoke with her to obtain a copy of Conrad's medical records. In response to the grand jury subpoena, Leal made him a copy of the records which he took with him at that time from the location. He did not read the grand jury subpoena to Leal, but left a copy of the subpoena with her. He does not know if she was ever required to appear before a grant jury. (S.F., Vol.I, pp. 34-36).

15. Hilborn obtained a copy of Conrad's medical records from Katy Community Hospital a/k/a/ Katy Medical Center through the use of the grand jury subpoena. (S.F. Vol. I, pp. 36-40). Hilborn identified Defendant's Exhibit No. 4 (S.F. Vol.II, Exhibits' Admitted at S.F., Vol.I,p.46) as a copy of Conrad's medical records obtained at Katy Medical Center a/k/a Katy Community Hospital on May 15, 1994. He could not remember an affidavit from the custodian, such as a business records affidavit, as among the records, but said that obtaining an affidavit from the custodian would be the normal procedure. He could not recall a release for treatment or other specific items within the medical records. He turned over all of the medical records to the District Attorney along with his report and paperwork on the case. (S.F., Vol. I, pp.40-42).

16. Hilborn obtained the grand jury subpoena through the District Attorney's Intake Office and not through the Grand Jury Division of the district Attorney's Office. He said the District Attorney's Intake Office **is where he has always been instructed to obtain a grand jury subpoena for medical records**, which is how he was instructed to handle accidents since he "was

transferred over to traffic warrants." (S.F> Vol.I, pp. 42-43).

17. When he sought the grand jury subpoena, he did not fill out any type of affidavit or application reflecting facts known to show probable cause, and was not required to submit any type of affidavit or application in connection with the subpoena. (S.F., Vol.I, p.43),

18. As to the process of obtaining the grand jury subpoena, Hilborn said he "received it from one of the District Attorneys who was working intake at the time, "who would be whoever signed it. He did not know that person, and was not aware whether that person had anything to do with a grand jury looking into the case at that time. (S.F.Vol.I, pp. 43-44).

19. Hilborn was unaware of any grand jury investigation of the case at that time, meaning on or about May 15, 1994. The issuance of the grand jury subpoena was at his request, and did not come from the request of a grand jury. Neither the foreman of any grand jury nor any assistant district attorney representing the State before the grand jury or otherwise requested issuance of the grand jury subpoena. The grand jury subpoena was not issued through the District Clerk's Office. (S.F.,Vol.I,pp. 44-46).

20. Hilborn testified that the subpoena referred to on page two of the complaint, Defendant's Exhibit No. One, is the same as the grand jury subpoena to which he testified. (S.F.,Vol.I,p.47).

21. When asked whether he had any facts other than from Conrad's medical records to indicate Conrad was intoxicated at the time of the accident, Hilborn said

"just from the alcoholic beverage that we obtained from the debris that came out of the particular vehicle." Regarding the debris, Hilborn testified he had no evidence to show Conrad actually drank any alcohol prior to the accident, and that there was no way to link the debris alcohol to Conrad personally so as to show she may have consumed any alcohol. Hilborn assumed the debris alcohol came from Conrad's vehicle, but had no personal knowledge that the debris alcohol came from her vehicle. (S.F.,Vol.I.pp. 13-14; 47-49).

22. Hilborn acknowledged it would be fair to say as to the issue of Conrad's intoxication underlying the charge of voluntary manslaughter herein, Defendant's Exhibit One, the complaint he filed, was based only on the information obtained from Conrad's medical records as to blood alcohol content. (S.F.,Vol. I,p.49).

23. Hilborn gave all Conrad's medical records, Defendant's Exhibit No. 4, obtained from Katy Community Hospital a/k/a Katy Medical Center pursuant to the grand jury subpoena, along with a copy of his offense report, accident report, and probable cause statement (meaning the complaint he filed, Defendant's Exhibit No. 1) to the clerk's office at the District Attorney's Intake Office. None of the records were returned to the Grand Jury Bailiff or the Grand Jury Division of the Harris County District Attorney's Office. (S.F.,Vol.I, p.50).

24. On cross-examination by the State, Hilborn said it was possible the grand jury subpoena was signed by a prosecutor named Mrs. Sckerl, but he could not recall whether the party signing same was male or

female. He said whoever at the D.A.'s office signs the subpoena requests the subpoena. He acknowledged the 176th District Court Grand Jury was mentioned in the grand jury subpoena form, Defendant's Exhibit No. 3. He did not know if that grand jury was in session. He said in the course of his experience as a law enforcement officer it appears to be normal procedure in the course of medical treatment for alcohol tests of patients to be made by hospitals. When he had the subpoena issued in order to obtain Conrad's medical records, he was interested in determining whether or not such a test had been done on Conrad and, if so, what the results of the test were, pursuant to his accident investigation. (S.F.,Vol. i,pp. 51-53).

25. Hilborn's actions in getting the grand jury subpoena to obtain Conrad's medical records were "Just to determine whether there was anything there or not." (S.F.,Vol.I,p. 54).

26. A motion to quash was filed by the defense after this case was indicted.

27. Hilborn did not talk to any news media personnel in connection with the case, and was not interviewed by any member of the *Katy Times* in connection with the story they ran about the case as it is not his practice to talk to media personnel, and he was not aware of any press releases on the matter. Hilborn was shown Defendant's Exhibit No. Five (S.F.,Vol. II, Exhibits; Admitted at S.F.,Vol. I,pp.56-58), a story about the wreck in the June 19, 1994 issue in the *Katy Times* in which alcohol test results from Conrad's medical records were reported, and he testified he had nothing to do with the article, but it contained the same

information as to blood alcohol test results reflected in Conrad's medical records that he obtained. (S.F., Vol,I,pp. 54-56). Defendant's Exhibit No. Six, a true copy of the indictment in the instant case (S.F.,Vol. II, Exhibits) was thereafter admitted into evidence. (S.F., Vol.I, pp. 58-59).

(B) TESTIMONY OF ANDY TOBIAS (S.F. VOL.I,pp.60-103; S.F.Vol.II, 15-24)

1. Andy Tobias is a Harris County Assistant District Attorney who was at all relevant times in charge of the Grand Jury Division of the Harris County District Attorney's Office. (S.F. Vol,I,p.60). Mr. Tobias expressed numerous opinions as to application of law which are not necessarily agreed with by the court. The facts related through Mr. Tobias' testimony are undisputed.

2. Tobias and Johnny Scott, Senior Bailiff for the Grand Jury, searched their respective records for any grand jury subpoena issued in connection with Cause No. 9413612, State v. Jennifer Marie Conrad, the instant case, and were unable to find any. Grand jury subpoenas in this regard would ordinarily be under control of the grand jury bailiffs; although, sometimes the issuing assistant district attorney will retain a copy in the files. (S.F., Vol. I, pp. 61-62)

3. Tobias said Defendant's Exhibit No. 3, the grand jury subpoena, was not part of his official records as head of the Grand Jury Division, and he had nothing to do with its issuance. He said the form appears to be a standard form for a Harris County District Attorney's Office Grand Jury Subpoena. Tobias described the process of issuance of a grand jury subpoena in the

Harris County District Attorney's Office (S.F., Vol. I, pp. 62-64). Of particular relevance is the following quotation from Tobias' testimony (S.F., Vol.I,p.63):

> At times officers come to the Intake Section of the District Attorney's Office when they're doing an investigation to aid them in **their** investigation in obtaining evidence for either the filing of charges or whatever, and ask an assistant working the Intake for a Grand Jury Subpoena and a Grand Jury Subpoena is prepared and then sometimes they call my people." [Emphasis Supplied].

4. Tobias' office, meaning the Grand Jury Division, had nothing to do with issuance of Defendant's Exhibit No. Three, the grand jury subpoena. The assistant who signed said exhibit was not a member of the Grand Jury Division. (S.F.,Vol.I,p.64).

5. The grand jury subpoenas can be issued to aid the officers in their investigations. (S.F.,Vol.I,pp.64-65). The only limitations Tobias' office puts on issuance of these subpoenas would be for attorney-client privileged materials. (S.F.,Vol.I,pp. 64-65).

6. Any one of 80 or so police agencies in Harris County, Texas could request issuance of such a grand jury subpoena by going to an Assistant District Attorney and requesting issuance, and the subpoena could then be used by the officer for the purpose of gathering evidence in connection with **their** investigation of various criminal matters. (S.F., Vol.I, p.65).

7. Tobias testified that there is no requirement for any kind of affidavit setting forth probable cause prior to

issuance of a grand jury subpoena, nor any requirement that a magistrate determine probable cause or reasonable suspicion from any facts prior to issuance of such subpoena. A grand jury subpoena is issued by the Harris County District Attorney's Office at discretion of **any** assistant district attorney pursuant to Art. 20.10 of the Code of Criminal Procedure. (S.F., Vol. I,pp.65-66).

8. Tobias in his testimony discussed what is known commonly as "in lieu of subpoena" whereby a witness would be allowed to satisfy a subpoena by delivering a copy of records or evidence to the serving officer or other named person instead of or in lieu of appearing before the grand jury, and he was not able to cite any statutory provision or rule allowing an "in lieu of" type subpoena in the State of Texas. (S.F., Vol. I, pp. 71-73).

9. Tobias testified Defendant's Exhibit No. 3 appears to have been issued under Art. 20.10 of the Code of Criminal Procedure, the section dealing with in-county subpoenas, and not under Art. 20.11, the section dealing with out-of-county witness subpoenas. Defendant's Exhibit No. 3 was not issued by the district clerk, and was not an "in lieu of subpoena" and did not authorize the process server to obtain any kind of documents or evidence in lieu or requiring appearance of the named witness before the grand jury. Tobias testified that a strict reading of Defendant's Exhibit 3 would allow the process server only to serve the subpoena in accordance with Art. 24.04 of the Code of Criminal Procedure by either reading it aloud or delivering a copy to the witness. (S.F., Vol.I, pp. 74-75).

10. Tobias brought records of the Grand Jury Division as to sitting grand juries showing that those sitting during the May 1994 term were those of the following 5 district courts: 176th, 177th, 178th, 179th, and 180th. (S.F., Vol. I, p. 75). Tobias could not answer whether any of those grand juries were considering the instant case at that time as he has no records which would so indicate. The grand jury actually returning the indictment in the instant case on november 18, 1994 was the 230th District Court Grand Jury, and the case was presented to said grand jury on the date by Connie Spence, assistant district attorney. He has no records to show whether the case was presented to a grand jury prior to November 18, 1994, and would ordinarily have such records if the case was so presented. (S.F., Vol. I,pp. 75-77).

11. Tobias has no records to show that the witness named in Defendant's Exhibit No. 3 (the medical records custodian) ever appeared before the 176th District Court Grand Jury for the May, 1994 Term, and has no records that the instant case was ever presented to the 176th District Court Grand Jury. His records only show the instant case has no record of presentation to the grand jury prior to November 18, 1994, the date it was presented to the grand jury. (S.F., Vol. I,pp. 76-78).

12. Tobias discussed agendas for cases presented to the grand jury in all cases except for sealed indictments, which this case did not involve, and identified Defendant's Exhibit No. 7 (S.F., Vol. II, Exhibits; Admitted at S.F., Vol,I, p. 81) as a copy of the agenda prepared involving the instant case showing its presentation on November 18, 1994 to the Grand Jury

of the 230th District Court. Tobias had no other agendas showing presentation of the instant case to any other grand jury at any time within his records in the Grand Jury Division. (S.F., Vol, I, pp. 80-81).

13. Tobias described the issuance and return of grand jury subpoenas by the Grand Jury Division and said ordinarily the subpoenas and evidence, if an "in lieu of" type subpoena, would be returned to him. (S.F.,Vol. pp. 82-83)

14. Tobias agreed that information obtained through the use of a grand jury subpoena would be secret information under various Texas laws. Tobias was not sure whether a release of grand jury information prior to action by a grand jury would be a violation of the grand jury secrecy laws. (S.F.,Vol. I.[[. 83-85).

15. Tobias was shown Defendant's Exhibit No. 5, the news article with Conrad's medical test results, and said if the information had been released by an assistant district attorney it would violate the grand jury secrecy laws unless it had been previously released in a public record. (S.F., Vol.I. p.87). His office would nevertheless discourage release of such information because of their policy not to try cases in the news media. (S.F., Vol.I,pp. 87-88).

16. Tobias reiterated it is standard procedure for a law enforcement officer to go to the District Attorney's Intake Division and speak to an assistant to obtain a grand jury subpoena, and said that "The subpoenas are in the computer there at Intake." (S.F., Vol. I, p. 89).

17. Defendant's Exhibit No. 3 is the type of grand jury subpoena that could be obtained at the District Attorney's Intake Section. It is not required for an officer to go speak with a foreman of a grand jury to get such a subpoena. The subpoena may be issued by any assistant district attorney, and in this case was issued by Carrie Sckerl. (S.F.,Vol.I,pp. 89-90.

18. Tobias discussed his understanding of various provisions of the Code of Criminal Procedure, and said to his knowledge the "course of procedure" utilized by the Harris County District Attorney's Office in issuing subpoenas to assist law enforcement officers in their investigation complies with Chapters 20 and 24 of the Code of Criminal Procedure. Tobias stated that the Code of Criminal Procedure did not require a probable cause affidavit in connection with a grand jury subpoena, or magistrate's determination of probable cause or reasonable suspicion. (S.F., Vol. I, pp. 90-92).

19. Tobias acknowledged the Code of Criminal Procedure provided for out-of-county witnesses, and an assistant would have to go through the court, and make application to the district clerk pursuant to Art. 20.11. If Art. 20.11 were not followed, he agreed there would be a violation of the statute in the sense of issuance of the grand jury subpoena not pursuant to the statute. He further said Art. 20.11 does not authorize an "in lieu of" type subpoena. Tobias acknowledged an Art. 20.11 out-of-county subpoena would require a written application to the district court and a showing that the witness' testimony is material. (S.F. Vol.I, pp. 97-100).

20. Tobias said his office does not require any showing

of any facts by a law enforcement officer prior to issuance of the grand jury subpoena to justify issuance thereof, but he **personally** would want a showing of facts. His office, though, has no policy requiring any application by a law enforcement officer such as an affidavit or other document setting forth facts showing probable cause, reasonable suspicion, or any definable legal standard prior to issuance of a grand jury subpoena. (S.F., Vol. I, pp. 100-101).

21. Tobias said he was unaware of any authority in the Texas Code of Criminal Procedure, state statutes, or other law which would authorize an "in lieu of" type grand jury subpoena. (S.F., Vol. I, pp. 102-103).

22. Tobias said assistant district attorneys come to work in Intake (meaning the District Attorney's Intake Section) either (1) by assignment through rotation or (2) optionally as extra duty with extra pay. The only requirement for extra work is that an assistant must have been with the office six months and have worked in Intake. He said Intake is part of the District Attorney's Office that is open 24 hours a day that handles direct filing of all criminal cases Class B and up, and handles citizen complaints and those brought by police officers. Intake personnel file changes in the county criminal courts and district courts, and assist in preparing arrest and search warrants. (S.F., Vol. II, pp. 19-20). The assistants working Intake are not magistrates as defined in the Code of Criminal Procedure. There is no specialized training required for work in Intake, and all training there is "on the job." It would be possible for someone to go to law school, pass the bar, work at the District Attorney's Office six months, and then

staff Intake. (S.F., Vol. II,pp. 19-22).

23. Tobias said from the face of Defendant's Exhibit No. 3 there was nothing to indicate that Caroline Sckerl was involved in the instant case prior to the time she was approached for issuance of the grand jury subpoena. (S.F., Vol Ii, pp.23-24).

(C) TESTIMONY OF JOHNNY SCOTT (S.F., Vol. II, pp. 3-6).

Johnny Scott is employed as Bailiff of the Harris County Grand Jury, being on of three, and is senior person. Scott in that capacity is records custodian of the official records kept by the Harris County Grand Juries in connection with cases pending. Scott searched his records for subpoenas or other records regarding the instant case and found none. Scott said such records would normally have been in his custody if they were part of official grand jury proceedings. Scott identified Defendant's Exhibit No. 7 (the agenda) as a record kept by the District Attorney's Grand Jury Division and not a record kept by him. Scott said he had no records regarding the instant case in his custody in his capacity as records custodian for the Harris County Grand Juries.

(D) TESTIMONY OF JOAN BURLESON (S.F.,VOL.II, pp. 7-13)

Joan Burleson is defendant Conrad's mother, and on May 6, 1994 went to Katy Community Hospital a/k/a Katy Medical Center in connection with an automobile accident in which her daughter was involved. Burleson's minor daughter, Conrad, was 17 years old at the time, having been born October 3, 1976, and Burleson was the time of the accident Managing Conservator of Conrad and legally responsible for her. Burleson as Managing Conservator signed a Consent for Treatment Form for Conrad which Burleson identified as p.2 of Defendant's Exhibit No. 8 (S.F.,Vol.II, Exhibits; Admitted at S.F. Vol.Ii,p.10) and signed a consent for HIV testing a p.3 of the exhibit, both in connection with treatment of Conrad's injuries from the automobile accident on May 6, 1994. Conrad did not personally sign the consent to treatment or any release forms. (S.F.,Vol.II,p 13). Neither Burleson nor Conrad authorized the hospital, doctors, nurses, or other employees to release any information obtained for the purpose of medical treatment of Conrad to any law enforcement agencies. Burleson as Managing Conservator for Conrad expected the medical records of her daughter to be kept confidential pursuant to the terms of the agreement reflected in the medical releases or consent forms in Defendant's Exhibit No.8

SECTION II

The defendant contends in Section II at pp. 3-7 of her Motion to Suppress Medical Records Evidence that the issuance of the grand jury subpoena in this case by the Harris County District Attorney's Office was part of a pretext or scheme participated in by the Harris County District Attorney's Office and various law enforcement agencies to avoid and violate the search warrant requirements regarding seizure of evidence by law enforcement officials as set out in the Fourth and Fourteenth Amendments to the United States Constitution; Article I, Sections 9 and 19 of the Texas Constitution' and Chapter Eighteen of the Texas Code of Criminal Procedure, including specifically but not limited to Article 18.01. The court sustains the defendant's contentions in this regard based upon the following findings of fact and conclusions of law:

Findings of Fact

1. The facts heretofore set out are incorporated herein by reference.

2. Deputy Hilborn was aware of no facts constituting probable cause to believe either (1) that Jennifer Conrad had been drinking prior to or at the time of the accident in question, or (2) that Jennifer Conrad was intoxicated prior to or at the time of the accident, or (3) that Jennifer Conrad's medical records at Katy Community Hospital a/k/a Katy Medical Center contained blood alcohol test results or other information relevant to the question of her intoxication at the time of the accident. The information known to Officer Hilborn at the time he requested the grand jury subpoena was not sufficient to constitute reasonable suspicion in this regard. Hilborn;s request for the grand jury subpoena was based on his hunch or suspicion that tests may have been performed, and he merely wanted to see if anything was contained in Conrad's medical records for the purpose of his investigation of the auto accident. (S.F.,Vol. I,pp. 13-28; 32-34; 47-49; 51-53).

3. Deputy Hilborn could not have legitimately obtained a search warrant to obtain Jennifer Conrad's medical records from Katy Community Hospital a/k/a Katy Medical Center where she was taken to the emergency room for treatment after the accident as Hilborn was aware of no facts sufficient to make a showing of probable cause to seize the records to a magistrate as would be necessary for issuance of a search warrant. (See No. 2 above.)

4. Deputy Hilborn was informed by the Harris County Medical Examiner's Office on May 9, 1994 that Judy Brown, the deceased named in the indictment herein, dies. (S.F., Vol. I, p. 29).

5. Deputy Hilborn on May 15, 1994 requested issuance of a grand jury subpoena from an Assistant District Attorney at the District Attorney's Intake Section, and as a result a grand jury subpoena identified as Defendant's Exhibit No. 3 was issued by an Assistant District Attorney named Carrie Sckerl who was assigned to the District Attorney's Intake Section. Defendant's Exhibit No. 3 was a grand jury subpoena directed to the Custodian of Records for Katy Community Hospital to appear instanter before the 176th District Court Grand Jury for the May Term, 1994, and produce Jennifer Conrad's medical records for treatment on May 6, 1994. (S.F.,Vol. I, pp. 29-32).

6. At the time of issuance of the grand jury subpoena identified as Defendant's Exhibit No. 3, no grand jury was actually considering the case of the State of Texas v. Jennifer Marie Conrad, and no grand jury actually considered the instant case until November 18, 1994, when the grand jury of the 230th District Court of Harris County returned the indictment (S.F.,Vol.II, Exhibits, Defendant's Exhibit No. 6) in the instant case after presentation of the case to said grand jury on that date. (S.F., Vol.I,pp. 44-46; 61-64; 75-81). The State offered no evidence to show any other factual scenario, and is in a better position than defendant to show what actually occurred concerning any grand jury action. The State is this context offered no evidence other than that reflected in the Statement of Facts to show when this case may

have actually been considered by a grand jury. No showing was made by the State as to whether any witness appeared before a grand jury considering this case.

7. The grand jury subpoena in the instant case (Defendant's Exhibit No. 3) was issued at the request of Deputy Hilborn to aid in **his** investigation of the case as a Deputy Sheriff and was not issued at the request of the foreperson of a grand jury **actually considering the case** or an attorney **actually representing the State** before a grand jury actually considering the case for the purpose of aiding the **grand jury's investigation** of the case. (S.F., Vol. I, pp. 29-34; 51-54; 63).

8. The grand jury subpoena in the instant case was not issued by any assistant district attorney or other person assigned to or working with or through the District Attorney's Grand Jury Division, but was issued by an assistant assigned to the District Attorney's Intake Section at the request of Deputy Hilborn, a peace officer, for the purpose of aiding **his** investigation. (S.F., Vol. I, pp. 29-34; 51-54; 63).

9. Deputy Hilborn served the grand jury subpoena upon Angelique Leal, Medical Records Custodian of the Katy Community Hospital a/k/a Katy Medical Center, on May 15, 1994, and as a result of the grand jury subpoena was given a copy of Jennifer Conrad's medical records, including a medical test result showing a blood alcohol content of .135. Deputy Hilbborn left a copy of the grand jury subpoena with Angelique Leal after obtaining a full copy of Jennifer Conrad's medical records. Conrad's medical records contained test results of HIV tests and other matters

as well. (S.F., Vol.I, pp. 34-36; S.F., Vol. II, Exhibits, Defendant's Exhibit Nos. 3 and 4).

10. Angelique Leal, the Medical Records Custodian for Katy Community Hospital, at no time appeared before a grand jury investigating the instant case. The State offered no evidence to show she ever appeared before a grand jury, and is in the best position to know. (S.F., Vol.I,pp.34-36; 76-78).

11. Hilborn filed involuntary manslaughter charges against Conrad through his complaint identified as Defendant's Exhibit No. One, which Hilborn said contained all facts known to him regarding probable cause for the filing of the charges, based wholly upon the blood alcohol test results contained in Conrad's medical records obtained by him from Katy Community Hospital a/k/a Katy Medical Center through use of the grand jury subpoena. (S.F., Vol.I, pp. 15-18; 49; S.F.,Vol. II, Exhibits, Defendant's Exhibit No. 1).

12. Hilborn turned over Conrad's medical records obtained through the grand jury subpoena to the District Attorney's Intake Section, along with a copy of his offense report, complaint (probable cause statement), and accident report. The items were not returned to the District Attorney's Grand Jury Division. (S.F.,Vol.I,pp. 40-42).

13. The information contained in Conrad's medical records, especially relating to the blood alcohol test results, obtained by Hilborn was not treated as secret grand jury material prior to the return of the indictment in the instant case on November 18, 1994 because (1) Hiborn published the test results in his

complaint filed on June 10, 1994 charging Conrad with involuntary manslaughter (Defendant's Exhibit No. 1) and (2) because the test result information was released and appeared in an article published in the *Katy Times Newspaper* on June 19, 1994, as appears in Defendant's Exhibit 5 prior to return of the indictment in the instant case on November 18, 1994. (S.F., Vol.II, Exhibits).

14. Hilborn was instructed presumably by the Harris County Sheriff's Department of District Attorney's Office to obtain grand jury subpoenas from the Harris County District Attorney's Intake Section for the purpose of obtaining evidence needed for his investigation of traffic accidents from the time he was first assigned to accident investigations. (S.F.,Vol.I,pp. 42-44; 63).

15. The Harris County District Attorney's Office through the district attorney personnel or any assistant district attorney routinely and systematically issues grand jury subpoenas deuces tecum at the request of any peace officer of any of the 80 or more law enforcement agencies in Harris County for the purpose of aiding the peace officer in the peace officer's investigation. Grand jury subpoenas issued under such circumstances are not issued at request of the foreperson of any grand jury actually considering the matter the peace officer is investigating, or at the request of any attorney actually representing the State of Texas before a grand jury actually considering the case under investigation by the peace officer. Grand jury subpoenas issued under such circumstances are issued by the issuing assistant district merely upon or at the request of a peace officer without a showing by the peace officer of any facts by application,

affidavit, or otherwise to constitute probable cause or any other definable legal standard for seizure of the items specified as sought in the grand jury subpoena, and are issued not to aid an actual grand jury investigation but to aid a peace officer's investigation. No magistrate ever passes upon the sufficiency of the facts prior to issuance of such a grand jury subpoena. Such grand jury subpoenas are typically issued through the District Attorney's Intake Section and not through the District Attorney's Grand Jury Division, but could be issued by the district attorney personally or any assistant district attorney as part of routine office practice or policy of the Harris County District Attorney's Office. Such grand jury subpoenas are served upon the named witness by the investigating peace officer and documents, records, or other evidence are obtained from the witness, who is not subsequently required to appear before a grand jury or produce the evidence before a grand jury. Such grand jury subpoenas are issued solely to enable peace officers to obtain and seize evidence without compliance with the laws regarding search warrants. (S.F.,Vol.I, pp. 42-46; 51-53; 62-65).

Conclusions of Law

Jennifer Conrad has a reasonable expectation of privacy in the contents of her medical records at Katy Community Hospital a/k/a Katy Medical Center. The following statutes support the notion that a person, and society generally, has a reasonable expectation of privacy as to contents of medical records: TEX.REV.CIV.STAT.ANN. art, 4495(b), § 5.08 (Vernon Supp. 1995; TEX.REV.CIV.STAT.ANN. art. 5561h, §2(b); Tex. Health and Safety Code Ann. §81.103(b)(6); 42 C.F.R. § 401.126(b)(1). See also: *State v. Comeaux*, 818 S.W.2nd 46, 49 (TEX.CRIM.APP. 1991); Tex. Stt'y Gen.

ORD-607 (1992); Tex. Att'y Gen. ORD-487 (1988); Op. Tex. Att'y Gen. No.JM-838 (1988). Conrad's medical records are papers of the defendant within the meaning of the Fourth and Fourteenth Amendments to the United States Constitution, Article 1, Section 9 and 19 of the Texas Constitution, and Art. 18.01 of the Code of Criminal Procedure. The seizure of Conrad's medical records through use of the grand jury subpoena was state action. Deputy Hilborn was not aware of facts sufficient to constitute probable cause to obtain a search warrant for seizure of Conrad's medical records at the time he requested issuance of the grand jury subpoena deuces tecum for the purpose of obtaining Conrad's medical records, and could not have lawfully obtained a search warrant for the seizure of Conrad's medical records, and could not have lawfully obtained a bench warrant for the seizure of Conrad's medical records as he was aware of no facts to show (1) that Conrad had been drinking or was intoxicated at the time of or prior to the automobile accident he investigated or (2) that the medical records of Conrad's treatment at Katy Community Hospital a/k/a Katy Medical Center contained any test results or other information relevant to the issue of Conrad's intoxication at the time of the automobile accident. The grand jury subpoena in the instant case was issued by an assistant district attorney at the Harris County District Attorney's Intake Section at Hilborn's request to aid Hilborn as a peace officer in his investigation, and was not issued at the request of the foreperson of a grand jury or attorney representing the State in connection with an actual grand jury investigation of the facts under investigation by Hilborn. The issuance and service of the grand jury subpoena in this case violated Chapters 20 and 24 of the Texas Code of Criminal Procedure, especially Art. 20.11 § 1 and Art. 24.04. The grand jury subpoena was issued to Hilborn as part of a systematic pattern or practice by the Harris County District Attorney's Office to aid peace officers in obtaining documents and other evidence for the purpose of the peace officer's investigation so as to enable the peace officers to avoid the search warrant requirements of the Fourth and Fourteenth Amendments to the United States Constitution' Article I, Sections 9 and 19 of the Texas Constitution; and Chapter 18 of the Texas Code of Criminal Procedure, especially Article 18.01, all of which require a showing of probable cause before a magistrate prior to issuance of a search warrant for seizure of a persons private papers, records, or other possessions. The practice of the Harris County District Attorney's Office in this regard as heretofore pointed out is a mere pretext to avoid the requirement of a search warrant mandated by the foregoing constitutional provisions and laws, and is accordingly violative of said constitutional and statutory provisions. Deputy Hilborn's obtaining of Conrad's medical records through the use of the grand jury subpoena was a seizure of evidence within the meaning of law, and under the circumstances required at a minimum a search warrant issued by a magistrate. Texas law does not generally authorize seizure of evidence by a peace officer except through a search warrant or by virtue of a recognized exception to the warrant requirement, none of which are presented by the facts in the instant case. The seizure of conrad's medical records under the facts presented was violative of the foregoing constitutional and statutory provisions heretofore set out, and consequently said medical records and all evidence and information obtained as a result of the seizure of same, including but not limited to blood alcohol test results, must be suppressed pursuant to the constitutional and statutory provisions heretofore set out and Article 38.23 of the Texas Code of Criminal Procedure.

SECTION III

Defendant contends in Section III at pp. 7-8 of her Motion to Suppress Medical Records Evidence that the seizure of her medical records in the instant case was an unlawful seizure within the meaning of TEX.CODE CRIM.PROC.ANN. art. 38.23 insofar as Articles 20.10 and 20.11 § 1 of the Code of Criminal Procedure do not authorize a peace officer serving a grand jury subpoena to seize evidence from a medical records custodian or other person in lieu of an appearance by the witness and production of such evidence by the witness before a grand jury. The court sustains defendant's contentions in this regard based upon the following findings of fact and conclusions of law;

1. The finding of fact heretofore made are incorporated by referenced herein.

2. Deputy Hilborn served the grand jury subpoena upon the medical records custodian of Katy Community Hospital a/k/a/ Katy Medical Center for the purpose of obtaining Conrad's medical records in connection with her treatment for injuries sustained in the accident on May 6, 1994, and left a copy of the subpoena with the witness. (S.F., Vol.I, pp.34-36).

3. The medical records custodian delivered a copy of all of Conrad's medical records to Deputy Hilborn at the time the grand jury subpoena was served because of the grand jury subpoena. (S.F., Vol. I, pp. 34-36)

4. The medical records custodian never personally appeared before a grand jury pursuant to the grand jury subpoena to produce the medical records sought as to Conrad, nor did any assistant or deputy medical record custodian. (S.F.,Vol. I, pp. 34-36; 76-78).

5. The grand jury subpoena was an instanter subpoena and did not specify a time and place for the appearance of the witness before a grand jury. (S.F.,

Vol.II, Exhibits, Defendant's Exhibit No. 3).

Conclusions of Law

Neither Article 20.10 nor Article 20.11 of the Texas Code of Criminal Procedure or any other law authorizes a peace officer or other person serving a grand jury subpoena issued thereunder to seize or obtain evidence from the witness named in the grand jury subpoena in lieu of requiring an appearance by the witness before the grand jury. Service of a grand jury subpoena under Article 20.10 or 20.11 of the Code of Criminal Procedure must be pursuant to Chapter 24 of the Code of Criminal Procedure, of which Article 24.04 specified that a subpoena shall be served by reading same in the hearing of the witness or by delivering a copy of the subpoena to the witness. The seizure of Conrad's medical records by Deputy Hilborn was accordingly in violation of Articles 20.10, 20.11,and 24.04 of the Code of Criminal Procedure and otherwise unauthorized by law, and all evidence obtained as a result of the seizure of Conrad's medical records must be suppressed pursuant to Article 38.23 of the Code of Criminal Procedure for this reason.

SECTION IV

Defendant contends in Section IV at pp. 9-10 of her Motion to Suppress Medical Records Evidence that the grand jury subpoena was unlawfully issued in violation of Article 20.11 § 1 of the Code of Criminal Procedure. The court sustains this ground based upon the following findings of fact and conclusions of law.

Findings of Fact

1. The findings of fact heretofore made are incorporated by reference herein.

2. The accident made the basis of the prosecution in this case occurred in Harris County, Texas. (S.F., Vol. I, p. 21-22).

3. Katy Community Hospital a/k/a/ Katy Medical Center is in Fort Bend County, Texas, along with its medical records custodian. (S.F.,Vol.I, p. 21-22).

4. The grand jury subpoena was issued by an assistant district attorney for Harris County, Texas. (S.F. Vol. I,pp.29-34;89-90; S.F., Vol.II, Exhibits, Defendant's Exhibit No. 3).

5. The grand jury subpoena was not issued at the request of the foreperson of a grand jury considering the case or at the request of or by an attorney actually representing the State of Texas before a grand jury actually considering or to consider the case. (S.F.,Vol. I, pp.29-32; 43-47; 51-54).

6. The grand jury subpoena was not issued by the district clerk. (S.F.,Vol.I,pp.29-32; 43-47; 51-54).

7. The grand jury subpoena was not issued upon a written application to a district court showing materiality of the testimony of the witness or otherwise, and was not issued at direction or upon approval of a district court. (S.F., Vol. II, Exhibits, Defendant's Exhibit No. 3).

Conclusions of Law

The court finds Article 20.11, § 1 of the Code of Criminal Procedure to have been violated in the following respects by issuance of the grand jury subpoena in the instant case: (1) the grand jury subpoena was not influenced at the request of the foreperson of a grand jury considering the case or by an attorney actually representing the State of Texas before a grand jury considering or to consider the case; (2) the grand jury subpoena was not issued upon a written application to a district court by the foreperson or an attorney actually representing the State of Texas before a grand jury considering or to consider the case. (3) the grand jury subpoena was not issued at the direction of a district court; (4) the grand jury subpoena was issued by the district clerk. The grand jury subpoena on its face purports to have been issued under Article 20.10 of the Texas Code of Criminal Procedure. (S.F.,Vol.II, Exhibits, Defendant's Exhibit No. 3). A grand jury subpoena pursuant to Article 20.11 of the Code of Criminal Procedure was required under the facts presented, assuming such a grand jury subpoena could have lawfully argued for Conrad's medical records, because the hospital and its records custodian was located in Fort Bend County, Texas and the medical records custodian was accordingly an out-of-county witness. The process, meaning the grand jury subpoena, for seizure of Conad's medical records was accordingly unlawfully issued in violation of Article 20.11 § 1 of the Texas Code of Criminal Procedure. The good faith exception of Art. 38.23(b) of the Texas Code of Criminal Procedure cannot apple to excuse the total noncompliance with Art. 20.11, § 1 as the process was not a warrant and did not issue by a neutral magistrate upon probable cause. All of Conrad's medical records and all evidence obtained thereby must be suppressed by virtue of the provisions of Article 38.23 of the Texas Code of Criminal Procedure for this reason.

SECTION V

Defendant contends in Section V at p. 10 of her Motion to Suppress Medical Records Evidence that the seizure of her medical records violated her constitutional right to privacy protected by Article I, Section 9 and 19 of the Texas Constitution. The court sustains this ground based upon the following findings of fact and conclusions of law:

Findings of Fact

1. The findings of fact heretofore made are incorporated by reference herein.

2. Deputy Hilborn personally interviewed Conrad at the emergency room at Katy Community Hospital a/k/a Katy Medical Center within a couple of hours after the accident. (S.F.,Vol.I, ppl 23-27).

3. Deputy Hilborn did not believe Conrad to be intoxicated at the time he interviewed and observed her at the emergency room. (S.F., Vol. I, pp. 23-27).

4. Deputy Hilborn at no time requested Conrad to submit to a blood, breath, or urine test to determine blood alcohol. (S.F.,Vol.I, pp. 25-27).

5. Deputy Hilborn did not file a test refusal form with the Texas Department of Public Safety as he never requested Conrad to submit to any type of blood alcohol test. (S.F.,Vol.I, p. 27).

Conclusions of Law

Conrad had a reasonable expectation of privacy as to her medical records as has heretofore been discussed. Conrad's medical records were within the zone of privacy protected by Article I, Sections 9 and 19 of the Texas Constitution. The State in the context of a constitutional right of privacy claim must demonstrate a compelling state interest in the items sought which it could not get by any less intrusive means. A blood, breath, or urine test to determine Conrad's blood alcohol could have been requested and compelled under the circumstances by Deputy Hilborn by virtue of the provisions of Article 6701l-5 of the Texas Revised Civil Statutes, and would have been a less intrusive means to determine Conrad's blood alcohol than seizure of her medical records, including HIV test results and other records. The State accordingly cannot demonstrate that no less intrusive means than seizure of Conrad's medical records existed to determine her blood alcohol at or near the time of the accident. The seizure of her medical records through the grand jury subpoena accordingly violated Conrad's right to privacy under Article I, Sections 9 and 19 of the Texas Constitution as Deputy Hilborn's failure to request a blood alcohol test under Article 6701l-5 constitutes a waiver of the State's ability to request seizure of the medical records. Conrad's medical records and all evidence recovered as a result of the seizure of same must accordingly be suppressed for this constitutional violation by virtue of the provisions of Article 38.23 of the Texas Code of Criminal Procedure.

SECTIONS VI AND VII

Defendant in Sections VI and VII at pp. 10-11 of her Motion to Suppress Medical Records Evidence contends the seizure of her medical records through the use of the grand jury subpoena amounted to an unlawful general exploratory search of her medical records which is violative of the Fourth and Fourteenth Amendments to the United States Constitution; Article I, Section 9 of the Texas Constitution; and Articles

18.01 abd 18.02(10) of the Texas Code of Criminal Procedure. The court sustains these grounds based on the following findings of fact and conclusions of law:

Findings of Fact

1. The findings of fact heretofore made are incorporated by reference herein.

2. As previously found, Deputy Hilborn at or prior to requesting issuance of the grand jury subpoena was unaware of facts or information to constitute probable cause or even reasonable suspicion (1) to believe Conrad was or may have been intoxicated at the time of the accident; (2) was drinking at or before the accident; or (3) that Conrad's medical records contained test results or other information relevant to the question of whether she was intoxicated at the time of the accident.

3. Deputy Hilborn at the time of requesting issuance of the grand jury subpoena was aware of no evidence or information that any blood alcohol or other tests had been performed by anyone at Katy Community Hospital a/k/a Katy Medical Center. (S.F., Vol. I,pp. 25-27; 32-34).

4. Deputy Hilborn at the time of requesting issuance of the grand jury subpoena was aware of no evidence or information that Conrad's medical records contained blood alcohol test results or other matters relevant to the question of whether Conrad was intoxicated at the time of the accident. (S.F.,Vol.I, pp. 25-27;32-34).

5. Deputy Hilborn requested issuance of the grand jury subpoena for Conrad's medical records for the following reason: "Just to determine whether there was anything there or not." (S.F., Vol. I, p. 54).

Conclusions of Law

Deputy Hilborn was unaware that Conrad's medical records contained anything relevant to the question of whether Conrad was intoxicated at the time of the accident at the time he requested issuance of the grand jury subpoena. Deputy Hilborn's request for the grand jury subpoena was based upon his mere hunch or suspicion that Conrad's medical records might contain incriminating test results or other evidence, and his request cannot even be characterized as reasonable as he was aware of nothing to show that Conrad;s medical records contained evidence relevant to the question of whether Conrad was intoxicated at the time of the accident. The seizure and search of Conrad's medical records by Deputy Hilborn was merely a "fishing expedition" and as such was an unlawful exploratory search under the Fourth and Fourteenth Amendments to the United States Constitution; Article I, Sections 9 and 19 of the Texas Constitution; and Articles 18.01 and 18.02(10) of the Texas Code of Criminal Procedure. Conrad's medical records and all evidence obtained therefrom must accordingly be suppressed by virtue of said constitutional and statutory provisions and Article 38.23 of the Texas Code of Criminal Procedure for this reason.

Signed and entered this 286 day of January, 1996.
(ini)

/s/ Jay W. Burnett
JUDGE PRESIDING

FILED
JAN 26 1996
TIME 6:30 PM
Harris County, Texas
BY K HARLY
Deputy

APPENDIX D

Affirmed and Opinion filed March 27, 1997.

In The
FOURTEENTH COURT OF APPEAL

NO. 14-96-00167-CR

THE STATE OF TEXAS, Appellant
V.
JENNIFER MARIE CONRAD, Appellee

On Appeal from the 183rd District Court
Harris County, Texas
Trial Court Cause No. 94-13612

OPINION

The State of Texas appeals the trial court's order granting Jennifer Marie Conrad's motion to suppress evidence consisting of her medical records on the grounds that (a) there was no abuse of grand jury subpoena power, (b) appellee has no reasonable expectation of privacy in her medical records, and (c) the medical records evidence could have been obtained by other means. We affirm.

Background

On May 6, 1994, Harris County Sheriff's Deputy Hilborn investigated an accident in which appellee lost control of and flipped the car she was driving. He found several cold, "sweaty" bottles of beer in the wreckage from the one car accident.

The accident occurred in west Harris County and appellee was taken to the Katy Medical Center in adjacent Fort Bend County. Hilborn arrived at the Katy Medical Center several hours after the accident because he first photographed and measured the accident scene. At the time he talked to appellee at the hospital, she appeared "injured and confused." However, Hilborn did not get close enough to determine if there was an odor of alcohol on her breath because she was still being treated in the emergency room. Nor did he ask that appellee take any blood, urine or breath test to determine if she was intoxicated.

On May 9, Hilborn learned that one of the passengers in appellee's car had died. Knowing that it was common medical practice for hospitals to draw blood from auto accident patients to check for the presence of alcohol, he obtained a grand jury subpoena from the Harris County District Attorney's office to secure the "Katy Community Hospital Records for Jennifer Marie Conrad, dob 10-3, treatment for 5-6-94." The subpoena was filled out by an assistant district attorney and reflected that it issued from the grand jury for the 176th District Court.[5]

Hilborn delivered the subpoena to the custodian of records of the Katy Medical Center. In response, the custodian provided Hilborn a copy of the medical records of appellee's treatment at Katy Medical Center from May 6 to May 7, 1994.

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[5] Hilborn testified that the subpoena actually issued from the Intake Division of the District Attorney's Office at a time when no grand jury was empaneled.

The medical records indicated that appellee's blood alcohol content was o.135 on May 6 after the accident. After Hilborn turned the records over to the District Attorney's office, appellee was indicted for involuntary manslaughter. She filed a pretrial motion to suppress the medical records, which the trial court granted on six independent grounds by written order dated January 12, 1996.[2]

In its sole point of error, the State asserts that the trial court erred in granting appellee's motion to suppress.

Standard of Review

A trial court's ruling on a motion to suppress is reviewed on an abuse of discretion standard. *Villarreal v. State*, 935 S.W.2d 134, 138 (Tex. Crim. App. 1996). An appeals court must view the evidence and all reasonable inferences therefrom in the light most favorable to the trial court's ruling and must sustain the trial court's ruling if it is reasonably supported by the record and is correct on any theory of law applicable to the case. *Id*.

Subpoena for Out-of-County Witness

As one ground for granting the motion to suppress, the trial court found that the State failed to comply with the requirement that grand jury subpoenas for out-of-county witnesses be issued only on written application to the district court showing materiality, [3] and that this statutory ground for suppression of the evidence does not require a showing of a reasonable expectation of privacy. *See* TEX. CODE CRIM. PROC. ANN. art 20.11 (Vernon 1977). [4] The State has not challenged this finding on appeal.

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[2] In addition to those six grounds, appellee claims that granting the motion to suppress was also proper because the contents of her medical records were not kept secret as required by the grand jury secrecy laws. *See* TEX. CODE CRIM. PROC. ANN. art 20.11 (Vernon 1977)

In order to preserve a complaint for appellate review, a party generally must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling he desired the court to make if the specific grounds were not apparent from the context. Tex. R. app. P. 52(a). However, in criminal cases, once jurisdiction attaches, appellate courts have a broad scope of review and discretion, and may review some issues of unassigned error.[5] In this regard, certain due process violations have been recognized to be so fundamental as to require review by an appellate court even without an objection being made during trial or a ground of error raised on appeal.[6]

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[3] See TEX. CODE CRIM. PROC. ANN. art, 20.11 (Vernon 1977).

[4] Article 38.23(a) provides, in part, that no evidence obtained in violation of the constitution or laws of the State of Texas or the United States shall be admitted in evidence against the accused in any criminal trial.

[5] *See Hensarling v. State*, 829 S.W.2d 168, 173 (Tex. Crim App. 1992) (holding that alleged error was fundamental and required review by the appellate court even in the absence of an objection at trial).

[6] *See Howeth v. State*, 645 S.W.2d 787, 788 (Tex. Crim. App. 1983); *Moreno v. State*, 114 Tex. Crim. 559, 26 S.W. 652, 653 (1930) (holding that "this court can only sit in review upon matters of error either fundamental or which are properly raised upon the trial").

In this case, because the State's failure to challenge this basis for granting the motion to suppress does not implicate any fundamental constitutional protection afforded to the accused, any error in granting the motion which is not properly raised on appeal by the State is waived. Accordingly, the portion of the trial court's order granting the motion to suppress for a violation of article 20.11 is affirmed.

Reasonable Expectation of Privacy

To whatever extent the preceding defect might be cured by reissuing the subpoena, we address the State's challenge to the trial court's finding that appellant had a reasonable expectation of privacy in her medical records. [7] The State challenges this finding because, in the criminal context, this is not an expectation that society recognizes as reasonable. As evidence of society's rejection of this expectation of privacy, the State cites both Texas Rule of Criminal evidence 509, stating that there is no doctor-patient privilege in criminal cases, and the repeal as to criminal cases of section 5.08 of the Medical Practice Act (the "Act")[8] providing doctor-patient confidentiality.

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[7] In support of this finding, the trial court stated, among other things:

> The following statues support the notion that a person, and society generally, has a reasonable expectation of privacy as to contents of medical records: TEX. REV. CIV. STAT. ANN. art 4495(b) § 5.08 (Vernon Supp. 1995); TEX REV. CIV. STAT. ANN. 5561h, §2(b); TEX HEALTH & SAFETY CODE ANN. §81.103(b)(6); 42 81.103(B)(6); 42 C.F.R. §401.126(b)(1). *See also State v. Comeaux*, 818 S.W.2d 46,49 (Tex. Crim.App. 1991). Tex Att'y Gen. ORD-607(1991); Tex. Att'y Gen. ORD-487 (1988); Op. Tex. Att'y Gen. No. JM-838 (1988).

Appellee responds that (1) she has a reasonable expectation of privacy in her medical records, (2) evidence improperly seized under the Fourth Amendment or Article I, Section 9 of the Texas Constitution is subject to exclusion under the exclusionary rules and article 38.23 of the Code of Criminal Procedure even if it is not excludable under a rule of evidence or privilege, (3) the Fourth Amendment does not require an exclusively statutory basis for a reasonable expectation of privacy, such as the Texas Medical Practices Act, but only a reasonable basis outside the Fourth Amendment, and (4) the Court of Criminal Appeals does not have authority to "repeal" an act of the legislature, *i.e.*, the applicability of the Act in criminal cases.[9]

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[8] *See* TEX. REV. CIV. STAT. ANN. art. 4495b (Vernon Supp, 1997). When enacting the Rules of Criminal Evidence, the Court of Criminal Appeals designated for repeal certain statutes "as they relate to criminal cases and criminal law matters ..." *See* "List of Repealed Statues" following TEX. R. CRIM. EVID. 1101. One statute listed for repeal was article 4495b, § 5.08. *Id.* The legislature expressly granted authority to the Court of Criminal Appeals to repeal these statutes:

> Section 9. Repeal of Certain Laws.
>
> a. The court of criminal appeals may designate for repeal any law listed in subsection (b) of this section if:
>
> (1) the court promulgates a comprehensive body of rules of evidence in the trial of criminal cases under Section 2 of this Act on or before January 1, 1986; and
>
> (2) at the time the court promulgates the rules, the court files with the secretary of state a list of statutes repealed under this section.
>
> (b) The option granted under Subsection (a) of this section applies only to:... Section 5.08, Medical Practice Act (Article 4495b, Vernon's Texas Civil Statutes).

Act of June 1985, 69th Leg., R.S., ch, 685 §§ 5-9 1985 Tex. Gen. Laws 2472, 2473-74. The Rules of Criminal evidence were adopted by the Court of Criminal Appeals on December 18, 1985, and became effective September 1, 1986.

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[9] Appellee also asserts in a cross-point that the trial court erroneously *denied* suppression on the ground that the seizure of her medical records violated article 4495b § 5.08(g)(10) insofar as the seizure was not in compliance with the exclusive procedure for obtaining the medical records of a victim, witness, or defendant in a criminal case. However, this cross-point was raised for the first time in appellee's supplemental brief after oral submission. With regard to points of error raised for the first time in supplemental briefs, the Court of Criminal Appeals has said:

> We perceive the clear import of the purpose stated in Rule 74(p) to be that all points of error sought to be reviewed and all replies thereto are to be included in the original brief. Supplemented or amended briefs bringing new matters to the appellate court may be filed later, but only "as justice requires" or "in the interest of justice" and under reasonable terms imposed by the court. The implication is that such briefs may be filed and considered only with leave of the appellate court. The idea that a party may *force* a new issue on an appellate court after briefs have been filed is foreign to the rules, although constitutional restraints such as due process may so require in a given case. The same is true for compelling matters that rise to the level of "in the interest of justice." Short of those situations, the decision whether to consider new matters raised in a supplemented or amended brief should be left to the sound discretion of the appellate court.

Rochelle v. State, 791 S.W.2d 121, 124-25 (Tex. Crim. App. 1990) (emphasis in original). Because appellee's cross-point does not satisfy the *Rochelle* standard to require our consideration of it, we conclude that it was not timely raised.

The Fourth Amendment to the United States Constitution provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause." U.S. Cost. amend. IV. The Texas constitutional protection against unreasonable searches and seizures[10] has been held to be at least as extensive as that of the Fourth Amendment. *See State v. Comeaux*, 818 S.W.2d 46,49 (Tex. Crim. App. 1991). In order to present a state or federal constitutional claim based on unlawful search, the appellee must establish that she had a reasonable expectation of privacy in the place searched. *Katz v. U.S.*, 389 U.S. 347, 360, 88 S.Ct. 507, 516 (1967) (Harlan. J., concurring); *Villarreal*, 935 S.W.2d at 138.[11] To demonstrate a reasonable expectation of privacy, the individual must satisfy a two-pronged test by showing that (1) she had a legitimate expectation of privacy in the invaded place or property, and (2) this expectation of privacy is one that society is prepared to accept as reasonable.[12] *Katz*, 389 U.S. at 361, 99 S.Ct. at 516

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[10] Article I, section 9 provides:

> The people shall be secure in their persons, houses, papers, and possessions, from all unreasonable searches and seizures, and no warrant to search any place, or to seize any person or thing, shall issue without describing them as near as may be, nor without probable cause, supported by oath or affirmation.

TEX. Const. art. I, sec. 9.

[11] To carry this burden, the accused must normally prove: (a) that by his conduct, he exhibited an actual subjective expectation of privacy, *i.e.*, a genuine intention to preserve something as private; and (b) that circumstances existed under which society was prepared to recognize his subjective expectations as objectively reasonable. *Smith v. Maryland*. 442 U.S. 735, 740, 99 S.Ct. 2577, 2580 (1979), *Villarreal v. State*, 935 S.W.2d 134, 138 (Tex. Crim. App. 1996). The following are relevant to whether the accused's subjective expectation was one that society was prepared to recognize as objectively reasonable: (1) whether the accused had a property or possessory interest in the place invaded; (2) whether he was legitimately in the place invaded; (3) whether he had complete dominion or control and the right to exclude others; (4) whether, before

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the intrusion, he took normal precautions customarily taken by those seeking privacy; (5) whether he put the place to some private use; and (6) whether his claim of privacy is consistent with historical notions of privacy. *Villarreal*, 935 S.W#.2d at 138.

[12] Although individual states may construe their own constitutions as imposing more stringent restraints on police conduct than the United States Constitution, Fourth Amendment interpretation turns on a *societal* understanding of areas needing protection rather than that of each particular state. *See California v. Greenwood*, 486 U.S. 35, 43 (1988). However, a review of cases from the various states yields no consensus that could represent a *societal* view of the protection to be afforded medical records. *See Pollard v. State*, 439 N.E.2d 177 (Ind. App. 1982) (evidence of testing of blood sample held admissible based on: (i) the state statute that allows disclosure of blood test results to law enforcement officers, (ii) the existence of probable cause, and (iii) the absence of state action in the withdrawal of blood; reasonable expectation of privacy not in issue); *State v. Dyal*, 478 S.2d 390 (N.J. 1984) (requiring investigating police to establish a reasonable basis to believe that the automobile driver was intoxicated through objective facts, and holding that a subpoena for medical records of these tests should be treated as the functional equivalent of a search warrant; thereby, impliedly finding a reasonable expectation of privacy); *State v. Fears*, 659 S.W.2d 370 (Tenn. Crim.App. 1983)(finding automobile driver lacked standing to challenge search and seizure of medical records located in possession of a third party; reasonable expectation of privacy not addressed directly); *State v. Jenkins*, 259 N.W.2d 109 (Wis. 1977) (finding no reasonable expectation of privacy in medical records due to absence of physician[patient privilege in homicide trials); *State v. Copeland*, 680 S.W.2d 327 (Mo. App. 1984)(finding a reasonable expectation of privacy in medical records and no implied consent under DWI statute because statute requires an arrest upon probable cause); *People v. Perlos*, 462 N.W.2d 310 (Mich. 1990) (finding no reasonable expectation of privacy in medical records)' *Commonwealth v. Riedel*, 651 A.2d 135 (Pa. 1994) (finding a reasonable

(Harlan, J., concurring). In *Comeaux*, the Court of Criminal Appeals held that a reasonable expectation of privacy existed in a blood sample given by a patient to a hospital for purposes of treatment, based in part, on "society's regard for this expectation, as evidenced by the Texas Medical Practice Act....", *i.e.* before its repeal as to criminal cases. *See Comeaux* 818 S.W.2d at 52-53.

In this case, the thrust of the State's argument is that the 1986 repeal as to criminal cases of the confidentiality requirement of section 5.08 of the Act demonstrates an abandonment of any reasonable expectation of privacy in medical records.[13] However, although *Comeaux* cites section 5.08 as a social or legislative fact reflecting that society deemed this expectation reasonable,[14] it also cites

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expectation of privacy in medical records).

[13] Four other Texas appeals courts have held that the repeal of section 5.08 of the Act in criminal cases is evidence that society no longer considers this expectation of privacy reasonable in criminal cases. *See Clark v. State*, 933 S.W.2d 332 (Tex. App. —Corpus Christi 1996, no pet. h.); *Corpus v. State*, 931 S.W.2d 30 (Tex. App.—Austin 1996, PDR pending 1622-96); *State v. Hurd*, 865 S.W.2d 605 (Tex.App.—Fort Worth 1993, no pet.); *Thurman v. State*, 861 S.W.2d 96 (Tex. App.—Houston [1st Dist.] 1993, no pet.).

[14] *See Comeaux*, 818 S.W>2d at 52 n.7. A social or legislative fact is a fact about the legal and social system that is helpful in resolution of the constitutional question whether in the context proven, society recognizes the asserted expectation of privacy as a reasonable one. *Chapa v. State*, 729 S.W.2d 723, 728 n.3 (Tex. Crim. App. 1987).

Another legislative fact that might have evidenced a reasonable expectation of privacy in one's medical records was U.S. Senate bill 1360, The Medical Records Confidentiality Act of 1995, which sought to protect privacy rights in medical records. *See* Griffith, "Senate Attempts to Regulate the Confidentiality of Medical Records," 34, No. 2 THE other facts, such as the consent form between a doctor and patient,[15] and the fact that the patient gave the blood sample in order to receive medical help with no intention of allowing that sample to be used for any other purpose. *See Comeaux*, 818 S.W.2d at 52. *Comeaux* also states:

> Common sense dictates, in this age of blood testing for everything from HIV infection to drug use, that a person does not assume that, by giving a sample of blood for private testing, that blood sample could then be submitted to the State, or to any other person or entity, for a purpose other than that for which it was given.

HOUSTON LAWYER 10 (Sept.-Oct. 1996); *see also* Privacy Protection Act, 42 U.S.C.A. §§ 2000aa-11(a)(1994) (recognizing special concern for privacy interests in cases in which a search or seizure of documents in connection with an investigation or prosecution that would intrude upon a known confidential relationship such as clergyman and parishioner, lawyer and client, or doctor and patient, and thus, requiring a warrant).

[15] "Inherent in [the consent form] is the expectation of the part of the patient that the medical staff odes not gain the right to do whatever they wish with what the patient has provided to them." *Comeaux*, 818 S.W.2d at 52. Further, the Court of Criminal Appeals has distinguished between the lack of the doctor-patient privilege, as it effects the doctor's ability to testify or the admissibility of medical records in a criminal proceeding, and a physician's general duty of confidentiality. *See Richardson v. State*, 865 S>W>2d 944, 953 n.7 (Tex. Crim. App. 1993). "That a doctor may eventually be called to testify or his medical records admitted in a criminal proceeding does not otherwise liberate him to disclose confidential information. Even if doctor confidentiality is not enforced by law, medical ethics demand it. And in any event, it is doubtful the tattling physician would retain his clientele for long!" *Id.* (citations omitted).

Id. Because the underlying offense in *Comeaux* was committed *before* the repeal of section 5.08, that decision was based on section 5.08 still being in effect, even though the decision was issued in 1991 well *after* that section's repeal in 1986. *See id.* at 52 n.6. Notably, however, despite the intervening repeal of section 5.08, the *Comeaux* opinion does not qualify its holding or otherwise suggest that a different result would be reached with regard to an offense committed after the repeal. Thus, we cannot *presume* that the Court of Criminal Appeals would necessarily reach a different result with regard to an offense committed after the repeal of section 5.08, but are instead bound to follow *Comeaux* as it is written.

For purposes of privacy, we can find no meaningful distinction between a patient's blood sample and the results of medical tests conducted upon it. Therefore, because *Comeaux* held that a reasonable expectation of privacy exists in a blood sample, that decision dictates that a reasonable expectation of privacy likewise exists in medical records containing the analysis of a blood sample, such as in this case.[16] Accordingly, the State's point of error regarding appellee's expectation of privacy is overruled, and the portion of the trial court's judgment suppressing the medical records evidence on that basis is also affirmed.

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[16] The State also argues that the implied consent provision found in section 724.011 of the Texas Transportation Code supports the absence of a reasonable expectation of privacy. However, implied consent is deemed to be given under that provision only after a person is *arrested* for an offense arising out of acts alleged to have been committed while operating a motor vehicle. *See* TEX. TRANS. CODE ANN. § 724.011 (Vernon 1996). The requirement of an arrest indicates that probable cause must have been demonstrated. *See, e.g.*, *Voisinet v. State*, 935 S.W.2d 424, 425-26 n.1 (Tex. Crim. App. 1996). Thus, if anything, by requiring a showing of probable cause, the arrest requirement in section 724.011 supports *the existence* of an expectation of privacy in the characteristics of one's blood.

Inevitable Discovery Doctrine

The State also argues that appellee's medical records evidence should not have been suppressed because it could have been obtained by a variety of other methods, such as a subpoena duces tecum, a search warrant, or a subpoena to appellee's physician or the medical records custodian.[17] However, the Court of Criminal Appeals has expressly rejected the inevitable discovery doctrine, holding that evidence obtained in violation of the law must be excluded whether or not it *might* otherwise have been obtained lawfully. *See State v. Daugherty* 931 S.W.2d 268, 269 (Tex. Crim. App. 1996) (en banc). Therefore, the State's point of error asserting the inevitable discovery doctrine is overruled.

Having determined that a reasonable expectation of privacy existed in appellee's medical records, we need not consider the State's remaining points addressing other alleged problems with the use of a grand jury subpoena to obtain those records. Accordingly, the judgment of the trial court is affirmed.

/s/ Richard H. Edelman
Justice

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[17] In support of this contention the State cites *Thurman v. State*, 861 S.W.2d 96, 100 (Tex. App. —Houston [1st Dist] 1993, no pet). However, the observation in *Thurman* that the State could have obtained the evidence in other ways was based, in part, on the finding that the "facts show the State had probable cause to obtain a search warrant for the blood test record." In this case, the trial court expressly found that no such probable cause existed, and the State has not challenged that finding on appeal.

Judgment rendered and Opinion filed March 27, 1997.

Panel consists of Justices Lee, Amidei, and Edelman.

Publish —— TEX. R. APP. P. 90.

MARCH 27, 1997.

JUDGMENT

THE FOURTEENTH COURT OF APPEALS

THE STATE OF TEXAS, Appellant

NO. 14-96-00167-CR V.

JENNIFER MARIE CONRAD, Appellee

This cause was heard on the transcript of the record of the court below. Having considered the record, this Court holds that there was no error in the judgment. The Court orders the judgment **AFFIRMED**, that the appellant pay all costs expended in this appeal, and that this decision be certified below for observance.

APPENDIX E

Motions for Rehearing Overruled, Affirmed,
Opinion of March 27, 1997 Withdrawn and
Substitute Opinion filed May 22, 1997.

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In The
FOURTEENTH COURT OF APPEALS

NO. 14-96-00167-CR

THE STATE OF TEXAS, Appellant

V.

JENNIFER MARIE CONRAD, Appellee

On Appeal from the 183rd District Court
Harris County, Texas
Trial Court Cause No. 94-13612

OPINION ON MOTION FOR REHEARING

The motions for rehearing of the State and appellee are both overruled. The opinion issued in this case on March 27, 1997 is withdrawn and the following opinion is issued in its place.

The State of Texas appeals the trial court's order granting Jennifer Marie Conrad's motion to suppress evidence of her medical records on the grounds that (a) there was no abuse of grand jury subpoena power, (b) appellee has no reasonable expectation of privacy in her medical records, and (c) the evidence could legally be obtained by other means. We affirm.

Background

On May 6, 1994, Harris County Sheriff's Deputy Hilborn investigated an accident in which appellee lost control of and flipped the car she was driving. He found several cold, "sweaty" bottles of beer in the wreckage from the one car accident.

The accident occurred in west Harris County and appellee was taken to the Katy Medical Center in adjacent Fort Bend County. Hilborn arrived at the Katy Medical Center a few hours after the accident because he first photographed and measured the accident scene. At the time he talked to appellee at the hospital, she appeared "injured and confused." However, Hilborn did not get close enough to determine if there was an odor of alcohol on her breath because she was still being treated in the emergency room. Nor did he ask that appellee take any blood, urine or breath test to determine if she was intoxicated.

On May 9, Hilborn learned that one of the passengers in appellee's car had died. Knowing that it was common for hospitals to draw blood from auto accident patients to check for the presence of alcohol, he obtained a grand jury subpoena from the Harris County District Attorney's office to secure the "Katy Community Hospital Records for Jennifer Marie Conrad, dob 10-3, treatment for 5-6-94." The subpoena was filled out by an assistant district attorney and reflected that it issued from the grand jury for the 176th

District Court.[1]

Hilborn delivered the subpoena to the custodian of records of the Katy Medical Center. In response, the custodian provided Hilborn a copy of the medical records of appellee's treatment at Katy Medical Center from May 6 to May 7, 1994. The medical records indicated that appellee's blood alcohol content was 0.135 on May 6 after the accident. After Hilborn turned the records over to the District Attorney's office, appellee was indicted for involuntary manslaughter. She filed a pretrial motion to suppress the medical records, which the trial court granted on six independent grounds by written order dated January 12, 1996.

In its sole point of error, the State asserts that the trial court erred in granting appellee's motion to suppress.

Standard of Review

A trial court's ruling on a motion to suppress is reviewed on an abuse of discretion standard. *Villarreal v. State*, 935 S.W.2d 134, 138 (Tex. Crim. App. 1996). An appeals court must view the evidence and all reasonable inferences therefrom in the light most favorable to the trial court's ruling and must sustain the trial court's ruling if it is reasonably supported by the record and is correct on any theory of law applicable to the case. *Id.*

Reasonable Expectation of Privacy

The State challenges the trial court's finding that appellant had a reasonable expectation of privacy in her medical records[2] because in the criminal context, this is not an expectation that society recognizes as reasonable. As evidence of society's rejection of this expectation of privacy, the State cites both Texas Rule of Criminal Evidence 509, stating that there is no doctor-patient privilege in criminal cases, and the repeal as to criminal cases of section 5.08 of the Medical Practice Act[3] (the "Act") providing doctor-

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[1] Hilborn testified that the subpoena actually issued from the Intake Division of the District Attorney's Office at a time when no grand jury was empaneled.

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[2] In support of this finding, the trial court stated, in part:

> The following statutes support the notion that a person, and society generally, has a reasonable expectation of privacy as to contents of medical records: TEX.REV.CIV. STAT.ANN. art. 4495(b) § 5.08 (Vernon Supp. 1995); TEX. REV. CIV.STAT ANN.art 5561h, § 2(b); TEX. HEALTH & SAFETY CODE ANN. §81.103(b)(6); 42 C.F.R. § 401.126IbO(1). *See also State v. Comeaux*, 818 S.W.2d 46, 49 (Tex, Crim.App. 1991); Tex. Att'y Gen. ORD-607 (1992); Tex. Att'y Gen. ORD-487 (1988); Op. Tex. Att'y Gen. No. JM-838 (1988).

[3] *See* TEX.REV.CIV.STAT.ANN. art 4495b (Vernon Supp. 1997). When enacting the Rules of Criminal Evidence, the Court of Criminal Appeals designated for repeal certain statutes "as they relate to criminal cases and criminal law matters ...." *See* "List of Repealed Statutes" following TEX.R.CRIM.EVID. 1101. One statute listed for repeal was article 4495b, section 5.08. *Id.* The Legislature expressly granted authority to the Court of Criminal Appeals to repeal these statutes:

> Section 9. Repeal of Certain Laws.
> (a) The court of criminal appeals may designate for repeal any law listed in subsection (b) of this section if:
> (1) the court promulgates a comprehensive body

patient confidentiality.

Appellee responds that (10 she has a reasonable expectation of privacy in her medical records, (2) evidence improperly seized under the Fourth Amendment or Article I, Section 9 of the Texas Constitution is subject to exclusion under the exclusionary rules and article 38.23 of the Code of Criminal Procedure even if it is not excludable under a rule of evidence or privilege, (3) the Fourth amendment does not require an exclusively statutory basis for a reasonable expectation of privacy, such as the Texas Medical Practices Act, but only a reasonable basis outside the Fourth Amendment, and (4) the Court of Criminal Appeals lacked authority to "repeal" an act of the legislature, *i.e.*, the applicability of the Act in criminal cases. [4]

> of rules of evidence in the trial of criminal cases under Section 2 of this Act on or before January 1, 1986; and
>
> (2) at the time the court promulgated the rules, the court files with the secretary of state a list of statutes repealed under this section.
>
> (b) The option granted under Subsection (a) of this section applies only to:...Section 5.08, Medical Practice Act (Article 4495b, Vernon Texas Civil Statutes).

Act of June 1985, 69th Leg., R.S., ch, 685 §§ 5-9 1985 Tex. Gen. Laws 2472, 2473-74. The Texas Rules of Criminal Evidence were adopted by the Court of Criminal Appeals on December 18, 1985, and become effective September 1, 1986.

[4] The Court of Criminal Appeals' authority to repeal section 5.08 is set forth in the preceding footnote. Appellee also asserts in a cross-point in a supplemental brief that, because no such authority existed, the trial court erred in denying suppression on the additional ground that the seizure of her medical records violated article 4495b, section 5.08(g)(10) by not complying with the exclusive procedure for obtaining the medical

The Fourth Amendment to the United States Constitution provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause." U.S. Const. amend. IV. The Texas constitutional protection against unreasonable searches and seizures [5] has been held to be at least as extensive as that of the Fourth amendment. *See State v. Comeaux*, 818 S.W.2d 46, 49 (Tex. Crim. App. 1991). In order to present a state or federal constitutional claim based on unlawful search, the appellee must establish that she had a reasonable expectation of privacy in the place searched. *Katz v. U.S.* 389 U.S. 347, 360, 88 S.Ct. 507, 516 (1967) (Harlan, J., concurring); *Villarreal*, 935 S.W.2d at 138.[6] To demonstrate a reasonable expectation of

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records of a victim, witness, or defendant in a criminal case. Because this cross-point was not timely raised in appellee's original brief and is not necessary to our disposition of the appeal, and because we do not sustain appellee's lack of authority argument, we do not reach this issue.

[5] Article I, section 9 provides:

> The people shall be secure in their persons, houses, papers, and possessions, from all unreasonable searches and seizures, and no warrant to search any place, or to seize any person or thing, shall issue without describing them as near as may be, nor without probable cause, supported by oath or affirmation.

Tex. Const. art. I, sec. 9.

[6] To carry this burden, the accused must normally prove: (a) that by his conduct, he exhibited an actual subjective expectation of privacy, *i.e.*, a genuine intention to preserve something as private; and (b) that circumstances existed under which society was prepared to recognize his subjective expectation as objectively reasonable. *Smith v. Maryland*. 442

privacy, the individual must satisfy a two-pronged test by showing that (1) she had a legitimate expectation of privacy in the invaded place or property, and (2) this expectation of privacy is one that society is prepared to accept as reasonable.[7] *Katz* 389 U.S. at 361, 88 S.Ct. at 516 (Harlan,

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U.S. 735, 740, 99 S.Ct. 2577, 2580 (1979); *Villarreal v. State*. 935 S.W.2d 134, 138 (Tex. Crim. App. 1996). The following are relevant to whether the accused's subjective expectation was one that society was prepared to recognize as objectively reasonable: (1) whether the accused had a property or possessory interest in the place invaded; (2) whether he was legitimately in the place invaded; (3) whether he had complete dominion or control and the right to exclude others; (4) whether, before the intrusion, he took normal precautions customarily taken by those seeking privacy; (5) whether he put the place to some private use; and (6) whether his claim of privacy is consistent with historical notions of privacy. *Villarreal*, 935 S.W.2d at 138.

[7] Although individual states may construe their own constitutions as imposing more stringent restraints on police conduct than the United States Constitution, Fourth Amendment interpretation turns on a *societal* understanding of areas needing protection rather than that of each particular state. *See California v. Greenwood*, 486 U.S. 35, 43 (1988). However, a review of cases from the various states yields no consensus that could represent a *societal* view of the protection to be afforded medical records. *See Pollard v. State*, 439 N.E.2d 177 (Ind.App. 1982)(evidence of testing of blood sample held admissible based on: (i) the state statute that allows disclosure of blood test results to law enforcement officers, (ii) the existence of probable cause, and (iii) the absence of state action in the withdrawal of blood; reasonable expectation of privacy not in issue); *State v. Dyal*, 478 S.2d 390 (N.J. 1984) (requiring investigating police to establish a reasonable basis to believe that the automobile driver was intoxicated through objective facts, and holding that a subpoena for medical records of these tests should be treated as the functional equivalent of a search warrant; thereby, impliedly finding a reasonable expectation of privacy); *State v. Fears*, 659 S.W.2d 370 (Tenn. Crim. App. 1983) (finding automobile driver lacked standing to challenge search and seizure of medical records located in possession of a third party; reasonable expectation of privacy not addressed directly); *State v. Jenkins*, 259 N.W.2d 109 (Wis. 1977)

J., concurring). In *Comeaux*, the Court of Criminal Appeals held that a reasonable expectation of privacy existed in a blood sample given by a patient to a hospital for purposes of treatment, based, in part, on "society's regard for this expectation, as evidenced by the Texas Medical Practice Act ....", *i.e.*, before its repeal as to criminal cases, *See Comeaux* 818 S.W.2d at 52-53.

In this case, the thrust of the State's argument is that the 1986 repeal as to criminal cases of the confidentiality requirement of section 5.08 of the Act demonstrates an abandonment of reasonable expectation of privacy in medical records.[8] However, although *Comeaux* cites section 5.08 as a social or legislative fact reflecting that society deemed this

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(finding no reasonable expectation of privacy in medical records due to absence of physician-patient privilege in homicide trials); *State v. Copeland*, 680 S.W.2d 327 (Mo. App. 1984) (finding a reasonable expectation of privacy in medical records and no implied consent under DWI statute because statute requires an arrest upon probable cause); *People v. Perlos*, 462 N.W.2d 310 (Mich. 1990) (finding no reasonable expectation of privacy in medical records); *Commonwealth v. Riedel*, 651 A>2d 135 (Pa. 1994) (finding a reasonable expectation of privacy in medical records).

[8] Five other Texas appeals courts have held that the repeal of section 5.08 of the Act in criminal cases is evidence that society no longer considers this expectation of privacy reasonable in criminal cases. *See Knapp v. State*, 942 S.W.2d 176 (Tex. App. —— Beaumont 1997, pet. filed); *Clark v. State*, 933 S.W.2d 332 (Tex. App. ——Corpus Christi 1996, no pet. h.); *Corpus v. State*, 931 S.W.2d 30 (Tex.App. —— Austin 1996, pet. granted); *State v. Hurd*, 865 S.W.2d 605 (Tex. App. ——Fort Worth 1993, no pet.); *Thurman v. State*, 861 S.W.2d 96 (Tex. App.——Houston [1st Dist.] 1993, no pet.). However,for the reasons stated in the following portion of the text, we disagree that *Comeaux* left this issue open to the appeals courts to decide.

expectation reasonable,[9] it also cites other facts, such as the consent form between a doctor and patient,[10] and the fact that the patient gave the blood sample in order to receive medical help with no intention of allowing that sample to be used for any other purpose.[11] *See Comeaux*, 818 S.W.2d at 52. *Comeaux* also states:

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[9] *See Comeaux*, 818 S.W.2d at 52n.7. A social or legislative fact is a fact about the legal and social system that is helpful in resolution of the constitutional question whether in the context proven, society recognizes the asserted expectation of privacy as a reasonable one. *Chapa v. State*, 729 S.W.2d 723, 728 n.3 (Tex. Crim. App. 1987).

Another legislative fact that might have evidenced a reasonable exception of privacy in one's medical records was U.S. Senate bill 1360. The Medical Records Confidentiality Act of 1995, which sought to protect privacy rights in medical records. *See* Griffith, "Senate Attempts to Regulate the Confidentiality of Medical Records, "34, No. 2 the HOUSTON LAWYER 10 (Sept.-Oct. 1996); *see also* Privacy Protection Act, 42 U.S.C.A. §§ 2000aa-11(a) (1994) (recognizing special concern for privacy interests in cases in which a search or seizure of documents in connection with an investigation of prosecution that would intrude upon a known confidential relationship such as clergyman and parishioner, lawyer and client, or doctor and patient, and thus, requiring a warrant).

[10] "Inherent [the consent form] is the expectation on the part of the patient that the medical staff odes not gain the right to do whatever they wish with what the patient has provided to them." *Comeaux*, 818 S.W.2d at 52. Further, the Court of Criminal Appeals has distinguished between the lack of the doctor-patient privilege as it effects the doctor's ability to testify or the admissibility of medical records in a criminal proceeding, and a physician's general duty of confidentiality. *See Richardson v. State*, 865 S.W.2d 944, 953 n.7 (Tex. Crim. App. 1993). "That a doctor may eventually be called to testify or his medical records admitted in a criminal proceeding does not otherwise liberate him to disclose confidential information. Even if doctor confidentiality is not enforced by the law, medical ethics demand it. And in any event, it is doubtful the tattling physician would retain his clientele for long!" *Id.* (citations omitted).

> Common sense dictates, in this age of blood testing for everything from HIV infection to drug use, that a person does not assume that, by giving a sample of blood for private testing, that blood sample could then be submitted to the State, or to any other person or entity, for a purpose other than that for which it was given.

Id. Because the underlying offense in *Comeaux* was committed *before* the repeal of section 5.08, that decision was based on section 5.08 still being in effect, even though the decision was issued in 1991 well *after* the section's repeal in 1986. *See id.* at 52 n.6. Notably, however, despite the intervening repeal of section 5.08, the *Comeaux* opinion does not qualify its holding or otherwise suggest that a different result would be reached with regard to an offense committed after the repeal. Thus, we cannot *presume* that the Court of Criminal Appeals would necessarily reach a different result with regard to an offense committed after the repeal of section 5.08, but are instead bound to follow *Comeaux* as it is written.[12]

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[11] In *Comeaux*, the tests performed by the hospital on the appellee's blood did not include a blood alcohol content analysis. 818 S.W.2d at 49. In addition, the blood sample was not requested with a grand jury subpoena, as in this case, but with a "Statutory Authorization; Mandatory Blood Specimen" which the officer presented to the hospital after his first request for a blood sample was refused for lack of an authorization. *Id.*

[12] Because the decisions in *Comeaux* and in this case do not affect the discoverability or admissibility of medical evidence, but only the manner in which it may be collected, those decisions do not affect the repeal of the patient-physician privilege under section 5.08 and the

As a practical matter, a sample of blood appears to have little utility other than for the information that an analysis of it might yield. For purposes of privacy, therefore, we can find no meaningful distinction between a patient's blood sample and the results of medical tests conducted upon it. Thus, because *Comeaux* held that a reasonable expectation of privacy exists in a blood sample, that decision dictates that a reasonable expectation of privacy likewise exists in medical records containing the analysis of a blood sample, such as in this case.[13] Accordingly, the State's point of error regarding appellee's expectation of privacy is overruled, and the portion of the trial court's judgment suppressing the medical records evidence on that basis is also affirmed.

Obtaining the Evidence by Other Means

The trial court's order granting suppression concludes by stating:

> Defendant's medical records seized from Katy Community Hospital a/k/a Katy Medical

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enactment of Rule 509.

[13] The State also argues that the implied consent provision found in section 724.011 of the Texas Transportation Code supports the absence of a reasonable expectation of privacy. However, implied consent is deemed to be given under that provision only after a person is *arrested* for an offense arising out of acts alleged to have been committed while operating a motor vehicle. *See* TEX. TRANSP. CODE ANN.§ 724.011 (Vernon 1996). The requirement of an arrest indicates that probable cause must have been demonstrated. *See, e.g., Voisinet v. State*, 935 S.W.2d 424m 425-26 n,1 (Tex. Crim. App. 1996). Thus, if anything, by requiring a showing of probable cause, the arrest requirement in section 724.011 supports *the existence* of an expectation of privacy in the characteristics of one's blood.

> Center by Harris County Deputy Sheriff Deputy James Hilborn on or about May 15, 1994 through the use of the grand jury subpoena obtained by him on that date, including all test results for blood alcohol and all evidence of any type whatsoever recovered or discovered by the State as a result of said seizure, are hereby declared inadmissible in evidence and are suppressed. The State shall not attempt to offer any test result or other evidence included in the scope of this order into evidence, and no witness for the State shall comment upon or allude to any evidence included within the scope of this order.

The State argues that granting the motion to suppress was of no benefit to appellee since the same evidence could be obtained in a variety of other ways,[14] and that, to the extent the order can be read to prohibit the State from subsequently obtaining the evidence by other means and introducing it into evidence, the trial curt "overstepped."

As to the first contention, the Court of Criminal Appeals has expressly rejected the "inevitable discovery" doctrine, holding that evidence obtained in violation of the law must be excluded whether or not it *might* have otherwise been obtained lawfully. *See State v. Daugherty*, 931 S.W.2d 268, 269 (Tex. Crim. App. 1996)(en banc). Therefore, to the extent that this portion of the State's point of error asserts the inevitable discovery doctrine, it is overruled.

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[14] In support of this contention the State cites *Thurman v. State*, 861 S.W.2d 96, 100 (Tex. App.— Houston [1st Dist] 1993, no pet). However, the observation in *Thurman* that the State could have obtained the evidence in other ways was based, in part, on the finding that the "facts show the State had probable cause to obtain a search warrant for the blood test record." In this case, the trial court expressly found that no such probable cause existed, and the State has not challenged that finding on appeal.

As to the second contention, we do not read the quoted portion of the trial court's order to apply to evidence other than that specifically offered in this case, but would agree with the State that the admissibility, such as under the "independent source" doctrine,[15] of evidence obtained in the future could only be determined when the manner of obtaining that evidence could be reviewed. Therefore, this portion of the State's point of error is also overruled, but without prejudice to the State's ability to obtain the evidence in a manner that satisfies the independent source rule or otherwise renders it admissible.

Having determined that a reasonable expectation of privacy existed in appellee's medical records, we need not consider the State's remaining points addressing other alleged problems with the use of a grand jury subpoena to obtain those records. Accordingly, the judgment of the trial court is affirmed.

/s/ Richard H. Edelman
Justice

Judgment rendered and Opinion filed May 22, 1997.

Panel consists of Justices Lee, Amidei, and Edelman.

Publish —— TEX. R. APP. P. 90.

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[15] *See, e.g., Murray v. United States*, 487 U.S. 533 (1988); *Segura v. United States*, 468 U.S. 796 (1984).

MARCH 22, 1997

JUDGMENT

THE FOURTEENTH COURT OF APPEALS

THE STATE OF TEXAS, Appellant

NO. 14-96-00167-CR V.

JENNIFER MARIE CONRAD, Appellee

This cause was heard on the transcript of the record of the court below. Having considered the record, this Court holds that there was no error in the judgment. The Court orders the judgment **AFFIRMED**, that the appellant pay all costs expended in this appeal, and that this decision be certified below for observance.

RECEIVED
MAY 22 1997

APPENDIX F

FOURTEENTH COURT OF APPEALS
1307 San Jacinto, 11th Floor
Houston, Texas 77002

Re: Case No. 14-96-00167-CR

Style: The State of Texas
v. Conrad, Jennifer Marie

Please be advised that, on this date, the Court OVERRULED appellee's(s') motion for rehearing in the above cause.

T.C. Case # 94-13612 Mary Jane Smart, Clerk

RECEIVED
FEB 27 1998

Donald W. Rogers, Jr.
Richard Haynes & Associates
4300 Scotland
Houston, TX 77007

FOURTEENTH COURT OF APPEALS
1307 San Jacinto, 11th Floor
Houston, Texas 77002

RE: Case No. 14-96-00167-CR
Style: The State of Texas
v. Conrad, Jennifer Marie

Please be advised that on this date the Court OVERRULED appellee's motion for en banc consideration in the above cause.

T.C. Case # 94-13612
Mary Jane Smart, Clerk

Donald W. Rogers, Jr.
Richard Haynes & Associates
4300 Scotland
Houston, TX 77007

APPENDIX G

OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS

P. O. BOX 12308, CAPITAL STATION
AUSTIN, TEXAS 78711

September 16, 1998
COA#: 14-96-00167-CR
RE: Case No. 0782-98
STYLE: STATE OF TEXAS V. CONRAD, JENNIFER MARIE

On this day, the Appellee's Petition for Discretionary Review has been REFUSED.

(JUDGE OVERSTREET WOULD GRANT)

Troy C. Bennett, Jr., Clerk

DONALD W ROGERS JR
4300 SCOTLAND
HOUSTON TX 77007

APPENDIX H

OFFICIAL NOTICE FROM COURT OF
CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITAL STATION
AUSTIN, TEXAS 78711

November 18, 1998
COA# 14-96-00167-CR
RE: Case No. 0782-98
STATE OF TEXAS V. CONRAD, JENNIFER MARIE

On this day, the appellee's Motion for Rehearing has been DENIED.
(JUDGE OVERSTREET WOULD GRANT)

Troy C. Bennett, Jr., Clerk

DONALD W. ROGERS JR.
4300 SCOTLAND
HOUSTON TX 77007

APPENDIX I

RECEIVED
FEB 21 1995
Harris County, Texas

NO. 94-13612

THE STATE OF TEXAS	§	IN THE DISTRICT COURT
	§	OF HARRIS COUNTY
V.	§	TEXAS
	§	183RD JUDICIAL
JENNIFER CONRAD	§	DISTRICT

MOTION TO SUPPRESS MEDICAL RECORDS EVIDENCE

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW JENNIFER CONRAD, Defendant in the above styled and numbered cause, and pursuant to Tex.Code Crim.Proc.Ann. art. 38.23, and other laws and moves the court to suppress use of her medical records seized by the State by use of a grand jury subpoena or summons served upon the Medical Records Custodian of Katy Medical Center, also known as Katy Community Hospital, by Deputy, D. J. Hilborn of the Harris County Sheriff's Department on or about May 17, 1994, including all test results reflected in said medical records, and all evidence obtained as a result of information reflected in her medical records, insofar as the seizure of Defendant's medical records was the product of an illegal, unlawful search and seizure requiring suppression of the evidence under Tex.Code Crim.Proc.Ann. art 38.23 and other laws for the reasons which will be hereafter shown.

I.

The Defendant is charged with the offense of involuntary manslaughter in the above styled and numbered cause resulting from an automobile accident involving an automobile driven by Defendant on May 6, 1994. The single vehicle accident which occurred at the 21900 Block of Westbound Interstate 10 in Harris County, Texas, and Defendant and several passengers riding with her were injured and taken to various hospitals. Judy Brown, the deceased named in the indictment herein who suffered a broken leg in the accident, was taken to Hermann Hospital in Houston, Texas, where she died as a result of an embolism or other complications from medical treatment at approximately 2:10 a.m. on May 9, 1994. Defendant was taken to Katy Medical Center, also known as Katy Community Hospital, after the accident on May 6, 1994 and was admitted to said hospital through the emergency room on said date. Numerous tests were ordered by her attending physician for the purpose of treatment of the injuries sustained in the accident, and the results of said tests, including a test showing Defendant's blood alcohol content at the time of admittance to the hospital, were included among Defendant's confidential medical records at said hospital. Defendant did not personally consent to any treatment, testing, or disclosure of information to any person. Defendant's mother, Joan Burleson Bighouse, signed a consent form for treatment of Defendant which required that all records compiled and results of tests administered be kept confidential by the attending physician, medical staff, and hospital, and did not authorize the release of Defendant's medical records to any law enforcement agency. No law enforcement personnel ever requested that Defendant take or submit to any test at any time after the accident to determine her blood alcohol content pursuant to Tes.Rev.Civ.Stat.Ann. art. 67011-5 or other law. Defendant has a reasonable expectation of privacy in her medical records in connection with her medical treatment resulting from the automobile accident on May 6, 1994, and said medical records are privileged and confidential papers of Defendant within the meaning of U.S. Const.amends. IV and XIV; Tex.Const.art I, §§ 9 and 19; and Tex.Rev.Civ.Stat.Ann. art. 4495b, §5.08 (Vernon Supp. 1995), a valid civil statute creating a physician-patient privilege which is controlling over Tex.R.Crim.Evid. 509 by virtue of the hierarchy established by Tex.R.Crim.Evid. 101(c), as will be demonstrated hereinafter and in Defendant's Trial Brief in Support of Motion to Suppress Medical Records Evidence. The medical records are additionally papers of the Defendant within the meaning of U.S,Const.Amend. IV and XIV and Tex.Const.art. I, §9, and Tex.Code Crim.Proc.Ann. arts. 18.01 et seq., which may not be seized without a search warrant. The State's use of Defendant's medical records which were unlawfully seized within the meaning of Tex.Code Crim.Proc.Ann. art. 38.23 by illegal and improper use of the grand jury subpoena or summons as aforesaid, as well as all evidence discovered therefrom, should be prohibited and ordered suppressed by this Honorable Court insofar as the use of the grand jury subpoena or summons by the State in the instant case was unlawful and illegal for each of the following reasons.

II.

The use of the grand jury subpoena or summons in the instant case to obtain Defendant's medical records was a pretext to avoid obtaining a search warrant in violation of U.S.Const.amends. IV and XIV; Tex.Const.art. 1, §§9 and 19; Tex.Code Crim.Proc.Ann. art. 18.01 et seq,; and Tex.Code Crim.Proc.Ann. arts 2.01 and 2.03(b), and the seizure of Defendant's medical records was in violation of said provisions and was unlawful within the meaning of

Tex.Code Crim.Proc.Ann art. 38.23. The grand jury subpoena or summons was issued by an assistant district attorney for Harris County, Texas without even a supporting affidavit after request from Sheriff Deputy D.J. Hilborn on or about May 15, 1994. Sheriff Deputy Hilborn did not have probable cause to request a search warrant. Tex.Code Crim.Proc.Ann. art 24.03 requires the clerk to issue subpoenas. No neutral and detached magistrate at any time prior to the issuance of the grand jury subpoena or summons determined the questions of: (1) there was probable cause (or even reasonable suspicion) to show a crime was committed or that Defendant;s medical records contained evidence relevant within the meaning of Tex.R.Crim.Evid. 401 to show Defendant may be guilty of a crime; (2) whether Defendant's medical records may be otherwise privileged within the meaning of the privileges and immunities clauses of U.S. Const.amend. XIV, § 1 and Tex.Const. art. I, § 19; (3) whether a warrant, or subpoena, or summons should issue for the seizure of the medical records; or (4) the scope of intrusion into Defendant's medical records which would be allowable pursuant to a search and seizure, assuming a search and seizure should be authorized. The pretextual nature of the "search and seizure" occurring in the instant case through the use of the grand jury subpoena or summons is more fully illustrated by the fact that no grand jury was even in session considering Defendant's case at the time of the issuance of the grand jury subpoena or summons to the extent that even a grand jury could be said to have determined the question of whether there was probable cause for seizure or review of Defendant's medical records. The custodian was not required to appear at a date and time certain and produce the records before a grand jury as required by Tex.Code Crim.Proc.Ann. arts, 20.10 or 20.11, and instead Sheriff Deputy Hilborn "seized" the records by obtaining copies thereof from the medical records custodian, who certified same by a business records affidavit similar to that authorized by Tex.R.Crim.Evid. 902(10), a procedure unauthorized by law for this purpose and therefore illegal and unlawful within the meaning of Tex.Code Crim.Proc.Ann. art. 38.23. The seizure of Defendant's medical records occurred without notice to Defendant and without Defendant or the records custodian being afforded an opportunity to object or assert privilege on behalf of Defendant. See: Tex.Rev.Civ.Stat.Ann. art. 4495b, §§5.08 (e) and (f) (Vernon Supp. 1995); Tex.R.Civ.Evid. 509(c); and Tex.R.Crim.Evid. 512. Defendant was not indicted until November 18, 1994, over six months after the accident.

The pretextual nature of the use of grand jury subpoena or summons in the instant case is further illustrated in that grand jury secrecy requirements of the law were violated by the State with respect to Defendant's medical records in that shortly after same were obtained through the use of the grand jury subpoena or summons on or before June 19, 1994, the Harris County District Attorney's Office, Harris County Sheriff's Department, or agents thereof, unlawfully disseminated secret information obtained through the use of the grand jury subpoena or summons, namely test results regarding Defendant's blood alcohol concentration at the time of the accident, to the public and the news media through (1) the public filing of the affidavit of Deputy D.J. Hilborn on or about June 10, 1994, five months prior to the return of the indictment herein, in connection with the complaint issued against Defendant wherein Deputy Hilborn disclosed the Defendant's medical test results obtained through the use of the grand jury subpoena (See Exhibit A attached hereto, a true copy of said affidavit), and (2) through one or more interviews with said media where said test result information was disseminated to the press by members the Harris County District Attorney's staff or Harris County Sheriff's Department personnel in violation of the grand jury secrecy requirements (See Exhibit B attached hereto, a true copy of the newspaper article appearing in the Katy Times, a newspaper in Katy, Texas, in the June 19, 1994 issue). The dissemination of the Defendant's medical record information and test results obtained through the use of the grand jury subpoena was a violation of the grand jury secrecy laws as embodied in Tex.Code Crim.Proc.Ann. arts. 19.34, 19.36, 20.02-20.04, and 20.16 recognized as sufficient cause to justify removal of a duly elected district attorney from office in *Stern v. State Ex Rel. Ansel*, 869 S.W.2d 614 (Tex.App. Houston [14th Dist.] 1994). If done by an assistant district attorney, such disclosure would additionally violate Tex.Code Crim.Proc.Ann. arts. 2.01 and 2.03(b), and further would violate Supreme Court of Texas, State Bar Rules art. X, §9 (Texas Disciplinary Rules of Professional Conduct) Rules 3.07(a) and 3.07(b)(3) (1994) (located in the pocket part for Volume 3 of the Texas Government Code in title 2, subtitle G app., following §83.006 of the Government Code). The use of Defendant's medical records and all evidence obtained therefrom should accordingly be suppressed as the use of the grand jury subpoena or summons was a mere pretext to avoid obtaining a search warrant, and the subsequent seizure of Defendant's medical record violated U.S. Const.Amends. IV and XIV; Tex.Const.art. 1, §§9 and 19; Tex.Code Crim.Proc.Ann. art 18.01 et seq., and use of same and any evidence obtained therefrom must accordingly be suppressed.

III.

The "seizure" of the Defendant's medical records from the Medical Records Custodian of Katy Medical Center, also known as Katy Community Hospital, was further unlawfully within the meaning of Tex.Code Crim.Proc.Ann. art. 38.23 insofar as Tex. Code Crim.Proc.Ann. arts. 20.10 and 20.11, §1 do not authorize the obtaining of records or documents, with or without a business records affidavit such as authorized by Tex.R.Crim.Evid. 902(10), by a peace officer independently of an appearance by the person to whom a subpoena is issued before a grand jury at a scheduled session at a time and place certain. The grand jury and/or any officer thereof has no authority to issue a warrant commanding seizure of records or documents or any other evidence by a peace officer or other person. The definition of a search warrant contained in Tex.Code Crim.Proc.Ann. art. 18.01(a) contemplates that any order to seize property be issued only by a neutral and detached magistrate after determination of probable cause. See also: Tex.Code Crim.Proc.Ann. art 18.01(b). A subpoena is simply a command for a witness to appear before a tribunal and, if duces tecum, to produce documents or other evidence before the tribunal. See: Tex.Code Crim.Proc.Ann. arts. 24.01; 24.02; and 24.28, §2, which defines the term "summons". A peace officer or other person serving a subpoena is constrained to comply with the provisions of Tex.Code Crim.Proc.Ann. art. 24.04, which directs that "a subpoena is served by reading the same in the hearing of the witness or by delivering a copy of the subpoena to the witness." The officer is thereafter required to make a return showing the manner of service,, namely either by reading aloud or delivery of a copy. Neither Tex.Code Crim.Proc.Ann. art. 24.04 nor Tex.Code Crim.Proc.Ann. arts. 20.10 or 20.11 authorizes an officer serving a subpoena to merely accept or seize copies of documents or records from a records custodian as done in the instant case in lieu of commanding the custodian's personal appearance before the tribunal in question. The manner in which the Defendant's medical records were obtained was accordingly unlawful within the meaning of Tex.Code Crim.Proc.Ann. art 38.23 insofar as the medical records custodian never personally appeared before the grand jury and produced Defendant's medical records to the tribunal, and said evidence and everything recovered therefrom should accordingly be suppressed.

IV.

The grand jury subpoena or summons issued in the instant case from the Medical Records Custodian of Katy Community Hospital, also known as Katy Medical Center, was further illegal and unlawful within the meaning of Tex.Code Crim.Proc.Ann. art 38,23 in that Tex.Code Crim.Proc.Ann. art. 20.11, §1 requires that written application for subpoena for an out-of-county witness be made by the foreman of the grand jury or attorney representing the state to the district court stating the name and residence of the witness and that his testimony is material. Tex.Code Crim.Proc.Ann. art. 20.11, §2 requires such subpoena to be served and returned in the manner prescribed in Chapter 24 of the Code Criminal Procedure, specifically Tex.Code Crim.Proc.Ann. art. 24.04 by reading same aloud or leaving a copy with the witness, and by making a return in compliance with said article. Katy Medical Center, also known as Katy Community Hospital, and its medical records custodian are located in Fort Bend County, Texas and accordingly the provisions of Tex.Code Crim.Proc.Ann. art. 20.11 apply to the issuance of subpoena in the instant case. No assistant district attorney had authority to issue the grand jury subpoena or summons in the instant case and the issuance of same by an assistant district attorney violated Tex.Code Crim.Proc.Ann. art. 20.11, §1. The return of Deputy Hilborn whereby he obtained or seized copies of the medical records from the medical records custodian was likewise unlawful in violation of Tex.Code Crim.Proc.Ann. arts. 20.11, §2 and 24,04. The medical records and all evidence obtained therefrom must accordingly be suppressed pursuant to Tex.Code Crim.Proc.Ann. art. 38.23.

V.

The seizure of Defendant's privileged and confidential medical records violated Defendant's constitutional right to privacy. The Defendant's medical records were in the zone of privacy protected by Tex.Const. art. I, §§9 and 19, and other provisions. Before seizure of such private papers would be constitutionally authorized, the State must demonstrate a compelling state interest which cannot be satisfied by less intrusive means. Insofar as a less intrusive means was available to the State to determine Defendant's blood alcohol content, had there been probable cause for such determination, in that the State could have requested or compelled a sample of Defendant's blood, breath, or urine pursuant to Tex.Rev.Civ.Stat.Ann. art. 67011-5, the state cannot show or demonstrate no lesser means of intrusion was available so as to be constitutionally entitled to seize or use the medical records. The State's failure to utilize such authorized procedures to determine Defendant's blood alcohol content additionally constitutes a waiver of the State's ability to invade Defendant's medical records.

VI.

The search and seizure of Defendant's medical records in the instant case through the use of the grand jury subpoena or summons whereby agents for the State obtained all of Defendant's privileged, confidential medical records at Katy Medical Center, also known as Katy Community Hospital, amounted to a general exploratory search of Defendant's private papers which is not authorized under U.S.Const.amends. IV and XIV. The seizure of all Defendant's medical records without guidance from a neutral and detached magistrate as to items properly seizable exceeded the scope of a reasonable search and seizure, and was accordingly a general exploratory search prohibited by

U.S.Const.amends. IV and XIV. The medical records and evidence obtained therefrom should accordingly be suppressed.

VII.

The search and seizure of Defendant's medical records in the instant case through the use of the grand jury subpoena or summons whereby agents for the State obtained all of Defendant's privileged, confidential medical records at Katy Medical Center, also known as Katy Community Hospital, amounted to a general exploratory search of Defendant's private papers which is not authorized under Tex.Const.art. I,§9 and Tex.Code Crim.Proc.Ann. arts. 18.01 and 18.02(10). The seizure of all Defendant's medical records without guidance from a neutral and detached magistrate as to items properly seizable exceeded the scope of a reasonable search and seizure, and was accordingly a general exploratory search prohibited by Tex.Const.art. I, §9 and Tex.Code Crim.Proc.Ann. arts. 18.01 and 18.02(10). The medical record and evidence obtained therefrom should accordingly be suppressed.

VIII.

The use of a grand jury subpoena or summons to seize Defendant's privileged, confidential medical records was in conflict with and violative of the exclusive manner authorized by law for obtaining access to a defendant's medical records in a criminal case as provided in Tex.Rev.Civ.Stat.Ann. art. 4495(b), §5.08(g)(8) (Vernon Supp. 1995). At the time of seizure of Defendant's medical records no criminal prosecution existed with respect to Defendant and accordingly no procedure existed to lawfully obtain Defendant's medical records as aforesaid art. 4495(b), §5.08(g)(8) provides the exclusive means of obtaining access to a defendant's medical in Texas. Tex. Rev.Civ. Stat. Ann. art. 4495(b), §5.08 (Vernon Supp. 1995) is a valid civil statute, amended by the legislature as recently as 1993, and was not repealed, whether on a "deemed" basis or otherwise, by the Order of the Court of Criminal Appeals dated December 18, 1985, effective September 1, 1985, adopting the Texas Rules of Criminal Evidence which was promulgated pursuant to Tex.Rev.Civ.Stat.Ann. art. 1811(f), §9 (Vernon Supp. 1995) which authorized the Court of Criminal Appeals to only designâte statutes which should be considered for later repeal by the legislature after promulgation of the Texas Rules of Criminal Evidence, and did not contain a provision actually repealing any listed statute from which the Court of Criminal Appeals might designate. While the Court of Criminal Appeals did designate Tex.Rev.Civ.Stat.Ann. art. 4495(b), §5.08 for repeal in its December 18, 1985 Order (See Vernon's Texas Rules Annotated, 1994 Special Pamphlet, Texas Rules of Criminal Evidence at pp. 150-151 and at pp. 397-398, and West Publishing Company, Texas Criminal Procedure - Code and Rules, 1994 Edition, Texas Rules of Criminal Evidence at pp. 354-355 and at p. 377), the Court of Criminal Appeals had no authority to repeal any statute under either Tex.Const. art V,, §31 or Tex.Rev.Civ.Stat.Ann. art. 1811(f), §9 (Vernon Supp. 1995), or other law. The legislature had no authority to delegate the repeal of any statute, an exclusively legislative function under Tex.Const. art. III, §1, to the judicial branch of government by virtue of Tex.Const. art. V, §31, as will be more fully shown in Defendant's Trial Brief in Support of Motion to Suppress Medical Records Evidence, as such delegation would violate the separation of powers embodied in Tex.Const. art. II, §1. The legislature to date has never repealed, and has in fact continued to amend as recently as 1993, the provisions of Tex.Rev.Civ. Stat.Ann. art. 4495(b), §5.08 (Vernon Supp. 1995) even through the legislature presumptively has knowledge of the

Court of Criminal Appeals Order of December 18, 1985. The continued amendment of the statute by the legislature without modification or alteration of same so as to preclude applicability of the statue to criminal cases constitutes an implicit rejection of the Court of Criminal Appeals designation of same for repeal and disapproval of Tex.R. Crim. Evid. 509 within the meaning of Tex. Gov't. Code Ann. §22.109(b) (Vernon 1988). Tex.Rev.Civ.Stat.Ann. art. 4495(b), § 5.08 (Vernon Supp. 1995) has never been repealed by the legislature, and is accordingly a valid and operative civil statute which is controlling over the provisions of Tex.R.Crim.Evid. 509 by virtue of the provisions of Tex.R.Crim.Evid. 101(c). The statute accordingly (1) establishes a physician patient privilege applicable to Texas criminal cases, and (2) protects discovery of a defendant's medical records in a criminal case except as authorized by the provisions of §5.08(g)(8). The physician-patient privilege and medical records privilege is a privilege of Defendant within the meaning of U.S.Const. amend. XIV, §1 and Tex. Const. art. I, §19 which cannot be modified by court rule, and it accordingly is a substantive right of a litigant within the meaning of Tex.Gov't.Code Ann. §22.109 (Vernon 1988) which cannot be modified by the Texas Rules of Criminal Evidence. Insofar as the State violated the provisions of Tex.Rev.Civ.Stat.Ann. art. 4495(b), §5.08(g)(8) (Vernon Supp. 1995) in obtaining the Defendant's medical records through use of an unwarranted and illegal grand jury subpoena or summons, said search and seizure was unlawful within the meaning of Tex.Code Crim. Proc.Ann. art. 38.23, and use of Defendant's medical records and all evidence obtained therefrom should accordingly be suppressed.

WHEREFORE PREMISES CONSIDERED, the Defendant request the Court to conduct a hearing on this motion and thereafter to suppress use of the Defendant's medical records and all evidence obtained therefrom as required by Tex.Code Crim.Proc.Ann. art. 38.23 and other laws for the reasons stated herein.

Respectfully submitted,

RICHARD HAYNES & ASSOCIATES, P.C.

By; /s/ Donald W. Rogers, Jr.
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ATTORNEYS FOR DEFENDANT,
JENNIFER CONRAD

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the attached and foregoing Motion to Suppress Medical Records Evidence has been served upon the District Attorney of Harris County, Texas by hand delivery and/or certified mail, return receipt requested.

SIGNED this 21 day of February, 1995.

/s/ Donald W. Rogers, Jr.

APPENDIX J

NO. 14-96-167-CR
COURT OF APPEALS OF TEXAS

FOURTEENTH DISTRICT

* * * * * * * * * * * * * * * *

THE STATE OF TEXAS,
Appellant

V.

JENNIFER MARIE CONRAD,
Appellee

* * * * * * * * * * * * * * * * * *

APPELLEE'S MOTION FOR REHEARING

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ATTORNEYS FOR APPELLEE

TO THE COURT OF APPEALS FOR THE FOURTEENTH DISTRICT OF TEXAS:

COMES NOW JENNIFER MARIE CONRAD, Appellee in the foregoing styled and numbered cause, by and through her attorney of record, Donald W. Rogers, Jr., and pursuant to Tex. R. App. P. 49 moves for a rehearing in connection with the Substituted Opinion (Appendix, Exhibit 1) and Judgment issued on December 11, 1997 reversing the trial court with respect to suppression of blood alcohol test results from Appellee's medical records. The panel decision as reflected in the Substituted Opinion as will be shown herein: (1) doesn't adhere to the appropriate standard of review for an order suppressing evidence; (2) doesn't give appropriate deference to the trial court's findings of fact and conclusions of law; (3) doesn't distinguish standing to complain of an unlawful *seizure* from that of an unlawful *search* under the Fourth Amendment and Tex. Const. Art. I, § 9; (4) doesn't address relevant issues raised under the Texas Constitution; (5) improperly makes "a reasonable expectation of privacy" an element of standing under Tex. Code Crim. Proc. Ann. art. 38.23, and misapplies said statute's exclusionary rule; (6) and doesn't recognize that standing to complain of an unreasonable search under the Fourth Amendment does not require a reasonable expectation of privacy in the *product* of the search but only the place searched. The trial court's suppression order, including Appellee's blood alcohol test results, should be fully affirmed for the reasons herein.

THE *HARDY* DECISION

The Substituted Opinion is erroneously based upon the majority opinion in *State v. Hardy*, No. 1061-94 (Tex. Crim. App. November 19, 1997), hereinafter referred to as *Hardy*, which is legally and factually distinguishable from the instant case for numerous reasons which will be noted and discussed herein.[1]

STANDARD OF REVIEW

An appellate court in reviewing a trial court's order suppressing evidence must affirm same if suppression of the evidence is correct on *any* theory of law applicable to the case whether or not addressed by the trial court and even when the trial court gives the wrong reasons for the decision. *Romero v. State*, 800 S.W.2d 539, 543 (Tex. Crim. App. 1990)[2] The following points for rehearing asserted by Appellee must be evaluated under this aspect of the standard for review.

POINT NUMBER ONE

Appellee has standing under the Fourth Amendment to complain of the unreasonable and unlawful *seizure* of her medical records and blood alcohol test result contained therein regardless of whether she has a reasonable expectation of privacy in the blood alcohol test result itself, an issue relevant only as to standing to complain of a *search* under the Fourth Amendment.[3] A reasonable expectation of privacy is not an element of standing to complain of an unlawful *seizure* within the meaning of the Fourth Amendment, as will be hereinafter discussed. All that need be shown for *seizure* standing is a possessory interest in the property seized. See J. Meeker, Jade Meeker's Guide to Arrest, Search & Seizure § II, E.2 at pp. 44-45 (Council for Law Education and Research 1995).

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[1] The only two basic issues addressed in *Hardy* were (1) whether the physician-patient privilege of Tex. Rev. Civ. Stat. Ann. art. 4495b, § 5.08; was lawfully repealed by the Court of Criminal Appeals as to criminal cases and (2) whether a defendant has a reasonable expectation of privacy for the purpose of standing to complain of a search *under the Fourth Amendment* as to results of blood alcohol testing by medical personnel at a hospital after a traffic accident.

[2] Other aspects of the standard for review in connection with a ruling suppressing evidence are discussed a pp. 10-11 of Appellee's Brief.

It is initially important to distinguish the different concepts of "search" and "seizure" within the Fourth Amendment. In this regard, a "search" occurs when an expectation of privacy that society is prepared to recognize as reasonable is infringed, whereas a "seizure" occurs when there is some meaningful interference with an individual's possessory interest in property. *United States v. Jacobsen*, 466 U.S. 109, 113, 104 S.Ct. 1652, 80 L.Ed.2d 85, 94 (1984). The Fourth Amendment exclusionary rule excludes any evidence obtained from a defendant by a search or a seizure in violation of Fourth Amendment rights, and fruits of such evidence are excluded as well. *Alderman v. United States* 394 U.S. 165, 171, 89 S.Ct. 961, 22 L.Ed.2d 176,

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[3] The majority opinion in *Hardy*, assuming without conceding the correctness of any issue decided, only addressed the very narrow question of whether a person has a reasonable expectation of privacy in a blood alcohol test result from a test administered by hospital personnel after an accident for the purpose of standing with regard to whether a *search* within the meaning of the Fourth Amendment occurred, and did not address whether society recognizes a reasonable expectation of privacy in medical records in general. Slip op. at 21. See generally as to the relationship of a reasonable expectation of privacy to the question of whether a search has occurred within the meaning of the Fourth Amendment *Rakas v. Illinois*, 439 U.S. 128, 144n.12, 99 S.Ct. 421, 58 L.Ed.2d 387, 401 n.12 (1978) and *Villareal v. State*, 935 S.W.2d 134, 138 (Tex. Crim. App. 1996). *Hardy* did not address the question of standing to complain of an unreasonable or illegal *seizure* under the Fourth Amendment.

185 (1969); *Wong Sun v. United States*, 371 U.S. 471, 488, 83 S.Ct. 407, 9 L.Ed.2d 441, 455 (1963). The Supreme Court has observed that in the ordinary case a *seizure* of personal property is "per se unreasonable within the meaning of the Fourth Amendment unless it is accomplished pursuant to a judicial warrant issued upon probable cause and particularly describing the items to be seized," subject to ordinary exceptions to the warrant requirement such as exigent circumstances.[4] *United States v. Place*, 462 U.S. 696, 701, 103 S.Ct. 2637, 77 L.Ed.2d 110, 116-117 (1983). *See also Mincey v. Arizona*, 437 U.S. 385, 390-391, 98 S.Ct. 2408, 57 L.Ed.2d 290, 298-299 (1978) (recognizing additionally that the burden is on the State to show the existence of exceptions to the warrant requirement).

In the instant case, the *seizure* of Appellee's medical records, including her blood alcohol test result, preceded the *search* of same. Appellee challenged the validity of the *seizure* of her medical records and blood alcohol test result under the Fourth Amendment, Article I, § 9 of the Texas Constitution, and other laws at the trial level, and the trial court specifically found that the *seizure* of Appellee's medical records and blood alcohol test result violated the Fourth Amendment among other laws for separate and distinct reasons.[5]

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[4] The *seizure* of the blood alcohol test result by use of a grand jury subpoena in *Hardy* was apparently not challenged at the trial level or on appeal as it was not addressed in the majority opinion, so it must be assumed that the subpoena in *Hardy* was legitimate. The *seizure* of Appellee's medical records through use of an illegitimate grand jury subpoena was challenged at the trial level in the instant case. The four dissenting judges in *Hardy* would require use of a search warrant to seize evidence.

The Fourth Amendment protects property and effects as well as people from unreasonable searches and seizures and protects two different interests of the citizen: (1) the interest in retaining possession of property and (2) the interest in maintaining personal privacy.[6] *Place*, 462 U.S. at 716, 77 L.Ed.2d at 126-127 (Brennan concurring). A "seizure" threatens possessory interest in property, whereas a "search" threatens privacy interests. *Id.* In *Place*, the defendant was detained at an airport and his luggage was seized under circumstances not constituting probable cause for a seizure in order that the luggage could be subjected to a "sniff test" by a trained narcotics dog. The dog alerted to the luggage, and the law enforcement agents involved subsequently obtained a search warrant and found cocaine therein causing Place to be charged with possession of cocaine. The Supreme Court found that the "sniff test" did not constitute a "search" requiring probable cause under the Fourth Amendment because the investigative technique was less intrusive than a typical search and led only to limited disclosure as to the contents of the luggage. *Place*, 462 U.S. at 707, 77 L.Ed.2d at 121. Nevertheless, the Supreme Court found that the *seizure* of the luggage was unreasonable under the Fourth Amendment and that the evidence obtained from the subsequent search of same was inadmissible because the length of detention of the luggage (90 minutes) for the "sniff test" was unreasonable in the absence of probable cause for a seizure. *Id.*, 462 U.S. at 708-710, 77 L.Ed.2d at 121-123.

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[5] The trial court's Findings of Fact and Conclusions of Law (F.F.C.L.) appear in the record on appeal (T., Vol. 1A, at 245-271), are appended to Appellee's Brief, and are based upon uncontroverted evidence. In the instant case, the trial court found that the use of the illegitimate grand jury subpoena to seize Appellee's medical records was part of a pretext or scheme participated in by the Harris County District Attorney's Office and various law enforcement agencies in Harris County to avoid the search warrant requirements of the Fourth Amendment and other laws and was thus violative os same. (F.F.C.L., Section II at 14-21, Conclusions of Law at 19-21). The trial court found the seizure was without a judicial warrant and without probable cause and consequently violated the Fourth Amendment, (F.F.C.L., Nos. 2 and 3 at 15; Conclusions of Law at 19-21). Indeed, the trial court found a warrant for seizure of the records could not have issued because of lack of probable cause to show (1) that Appellee was intoxicated at the time of the accident or (2) that her medical records contained anything relevant to the issue of whether she was intoxicated at the time, distinguishing the case from *Hardy*. (F.F.C.L., Conclusions of Law at 19-20). The trial court found Article I, § 9 of the Texas Constitution was violated for the same reasons. No evidence of any kind was offered by the State to show any recognized exception to the warrant requirement for seizure of evidence under the Fourth Amendment or Tex. Const. art. I, § 9.

[6] The trial court found that Appellee's medical records were papers of the defendant within the meaning of the Fourth and Fourteenth Amendments and Tex. Const. Art. I, §§ 9 and 19 (F.F.C.L., Conclusions of Law at 20).

Subsequently, in *Soldal v. Cook County*, 506 U.S. 56, 68, 113 S.Ct. 538, 121 L.Ed.2d 450, 463 (1992), the Supreme Court recognized that its cases "hold that seizures of property are subject to Fourth Amendment scrutiny even though no search within the meaning of the Amendment has taken place." The court in *Soldal* observed that its "cases unmistakably hold that the Amendment protects property as well as privacy." *Id.*, 506 U.S. at 62, 121 L.Ed.2d at 459. The Court also discussed *Place*, *supra*, observing as follows:

> In Place, although we found that subjecting luggage to a "dog sniff" did not constitute a search for Fourth Amendment purposes because it did not compromise any privacy interest, taking custody of Place's suitcase was deemed an unlawful seizure for it unreasonably infringed "the suspects

> possessory interest in his luggage." 462 US,at 708, 77 LEd2d 110, 103 SCt 2637. Although lacking a privacy component, the property rights in both instances nonetheless were not disregarded, but rather were afforded Fourth Amendment protection.

Id., 508 U.S. at 63-64, 121 L.Ed.2d at 459-460. See also *Jacobsen, supra*, 466 U.S. at 124-126, 80 L.Ed.2d at 101-102. In *United States v. Padilla*, 508 U.S. 77, 113 S.Ct 1936, 123 L.Ed.2d 635, 640-641 (1993), the Court remanded the case for a determination as to whether each respondent had either (1) a possessory interest in the automobile stopped or (2) a reasonable expectation of privacy invaded by the search of same for the purpose of determining standing for a seizure or a search under the Fourth Amendment. See also *U.S. v. Cardona-Sandoval*, 6 F.3d 15, 25 n.10 (1st Cir. 1993); *Winters v. Board of County Com'rs*, 4 F.3d 848, 853-854 (10th Cir. 1993); *G & G Jewelry, Inc. v. City of Oakland*. 989 F.2d 1093, 1098-1102 (9th Cir. 1993). The Court of Appeals of Texas has apparently not directly addressed the issue of standing to contest an unlawful *seizure* of property under the Fourth Amendment, but has clearly recognized that a distinction exists between standing to complain of an unlawful *seizure* and standing to complain of an unlawful *search*. In *Chapa v. State*, 729 S.W.2d 723, 725 n.1 (Tex. Crim.App. 1987), the Court observed:

> "That appellant failed to assert ownership in the contraband would be relevant to a challenge of its *seizure*, but here the challenge is to the *search*, of which the heroin was a fruit. See *United States v. Jacobsen*, 466 U.S. 109, 104 S.Ct. 1652, 80 L.Ed.2d 85 (1984) (distinguishing 'searches' and 'seizures'). So long as appellant can establish

> a reasonable expection of privacy in the area searched, he has shown standing [for the purpose of a search]."

It is clear from the foregoing authorities that standing to complain of an unreasonable or unlawful *seizure* does not require consideration of whether the defendant has a reasonable expectation of privacy in the item seized, but only requires a showing of some possessory interest in the item seized.

Appellee unquestionably has a "possessory interest" in her own medical records and blood alcohol test result and consequently has standing under the Fourth Amendment to complain of the unreasonable, unlawful seizure of both.[7] The medical records and the blood alcohol test result must accordingly be suppressed under the Fourth Amendment exclusionary rule because they were obtained as a result of an unreasonable *seizure* violative of Appellee's Fourth Amendment rights regardless of any consideration of reasonable expectation of privacy in the blood alcohol test result or Fourth Amendment *search* under *Hardy, Alderman, supra; Wong Sun, supra*.

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[7] The State has never contested that Appellee has basic legal standing and has only asserted she has no reasonable expectation of privacy, which relates only to the question of whether there has been a "search." The trial court found Appellee has standing. Appellee's standing in this regard was discussed in Appellee's Brief at 12, 17-19. Appellee has a legally actionable interest in controlling access to and disclosure of information from her medical records under Article 4495b, § 5.08(j), and has statutorily conferred rights to bring an action for damages and injunctive relief, and in limited instances a criminal prosecution, for improper disclosure or release of her medical records and her AIDS test records contained therein. Tex. Rev. Civ. Stat. Ann. art. 4495(b), § 5.08(1) (Vernon Supp. 1997); Tex. Health and Safety Code Ann. § 81.103(j) and 81.104 (Vernon 1992); *Cassingham v. Lutheran Sunburst Health Service*, 748 S.W.2d 589, 591 (Tex. App.--San Antonio 1988, no writ) (discussing cause of action for improper disclosure of information under Art. 4495b § 5.08). Appellee has contractual rights limiting access to her medical records as well as a result of contractual provisions of the Consent to Treatment Form (Appendix, Exhibit 2; Ex. 8 at trial) signed on her behalf by her mother. (F.F.C.L., (D) at 14). Additionally, doctors and hospitals hold a fiduciary relationship with patients, which distinguishes the situation from other relationships. See generally 42A Tex. Jur. 3d, Healing Arts and Institutions §§ 158 and 159.

POINT NUMBER TWO

Appellee has standing to complain of the unlawful *seizure* of her medical records and blood alcohol test results under Article I, § 9 of the Texas Constitution, which protects people "in their persons, houses, papers, and possessions "from" all unreasonable *seizures* or *searches*," as held by the trial court, for the same reasons and considerations as expressed in Point Number One herein as Article I, § 9 provides at least as much protection as the Fourth Amendment and the same standards should apply to *seizure* standing. See *supra* notes 5,6, and 7; *Heitman v. State*, 815 S.W.2d 681, 690 (Tex. Crim. App. 1991); *State v. Comeaux*, 818 S.W.2d 46, 49 (Tex. Crim. App. 1991).

POINT NUMBER THREE

The Substituted Opinion at pp. 4-5 erroneously holds that a "reasonable expectation of privacy" is an element of standing for the purpose of Article 38.23 of the Texas Code of Criminal Procedure and its exclusionary rule. It is well established that the states may prescribe stricter exclusionary rules than that arising under the Fourth Amendment. *Alderman, supra*, 394 U.S. at 175, 22 L.Ed.2d at 188; *Garcia v. State*, 829 S.W.2d 796, 798 (Tex. Crim. App. 1992). A violation of a state statute or any constitutional provision requires suppression of evidence under Article 38.23. *Polk v. State* 738 S.W.2d 274, 276 (Tex. Crim.

App. 1987). See also *Erdman v. State*, 861 S.W.2d 890, 893 (Tex. Crim. App. 1993). The trial court in the instant case applied Article 38.23, finding separate and distinct Texas statutory violations and various state and federal constitutional violations from the search and seizure of Appellee's medical records and blood alcohol test results, each of which would separately and independently trigger the exclusionary rule of Article 38.23.[8] Article 38.23 requires suppression of any unlawfully obtained evidence without more. *State v. Daugherty*, 931 S.W.2d 268, 270 (Tex. Crim. App. 1996) (holding the Fourth Amendment inevitable discovery doctrine inapplicable to exclusion of evidence under Article 38.23).

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[8] The trial court found that the grand jury subpoena in the instant case was illegitimate, distinguishing *Hardy*, and that the State's use of the bogus grand jury subpoena to *seize* Appellee's medical records and blood alcohol test result violated several Texas statutes: (1) Tex. Code Crim. Proc. Ann. art 18.01 and Ch. 18 (F.F.C.L. at 19-20; (2) Tex. Code Crim. Proc.Ann. art. 20.11, § 1 (F.F.C.L. at 20, 22-24); (3) Tex. Code Crim.. Proc. Ann. arts 20.10, 20.11, and 24.04 (F.F.C.L. at 21-22). The trial court also found the seizure violated Appellee's constitutional right to privacy under Tex. Const. art. I, §§ 9 and 19 (F.F.C.L. at 24-25). The trial court found the seizure and search of Appellee's medical records amounted to an unlawful general exploratory search under the Fourth and Fourteenth Amendments and Tex. Const. art. I, § 9 and Tex. Code Crim. Proc. Ann. arts. 18.01 and 18.02(10) among other constitutional violations. (F.F.C.L. at 25-27). Not found by the trial court, but equally relevant under *Romero, supra* are the facts that (1) Appellee's medical records are privileged under Tex. Rev. Civ. stat. Ann. art 4495b, § 5.08 and (2) the State violated the exclusive statutory provisions of Art. 4495b, § 5.08(g)(8) [now (g) (10) for obtaining medical records, a procedural statute not affected by the "deemed repeal" of the Medical Practice Act (See Appellee's brief at 40-41). Despite the majority opinion in *Hardy*, the court of Criminal Appeals has no authority to repeal the Medical Practice Act (Art. 4495b, §5.08) under Tex. Rev. Civ. Stat. Ann. art. 1811f § 9 (Vernon Supp. 1997) as the Legislature had no express authority under the Texas Constitution to delegate the function of repeal of a statute to the Court of Criminal Appeals, and the action of the Court in this regard violates the separation of powers provisions of Texas Const. art. II, § 1 and is null and void. (See Appellee's Brief at 33-35, 39-40 and Appellee's supplemental brief filed 12/3/97 at 23-27). The voters approving Tex. Const. Art. V, §31 on November 5, 1985, authorizing delegation of rulemaking authority to the courts, could not have approved delegation of the legislative function of

The exclusionary rule under Article 38.23 on its face does not require a showing of a reasonable expectation of privacy in the place searched or the items seized.[9] Article 38.23 only requires- "standing" to complain of the item sought to be introduced into evidence, and the "standing" required under Article 38.23 is nothing more than a showing of a justiciable interest in the evidence against which objection is lodged and is derived from the civil courts. *Fuller v. State*, 829 S.W.2d 191, 201-202 (Tex. Crim. App. 1992). A defendant need only show some actionable wrong visited upon him connected with the seizure of the evidence. *Id.* at 202. *Fuller* involved a situation where Fuller had no legal interest whatsoever in the property subject to search and seizure therein, a tape recording owned by fellow jail inmate Brenda Hall, and suffered no violation of any legal right on his own account as a result of the theft and illegal seizure of

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repeal of statutes as the explanatory statement of the proposed amendment required under Tex. Const. art. XVII, § 1 and the ballot description of the provision did not mention repeal of statutes.

[9] The issue of reasonable expectation of privacy is relevant with regard to Article 38.23 only as to the question of whether an illegal *search* occurred under the Fourth amendment, in which case both the Fourth Amendment exclusionary rule and that of Article 38.23 would be triggered. *Cf. Johnson v. State*, 871 S.W.2d 744, 750-751 (Tex. Crim. App. 1994) (recognizing attenuation doctrine applies to determine whether evidence was obtained in violation of Fourth Amendment). Application of the Article 38.23 exclusionary rule is unnecessary in the case of a Fourth Amendment violation as suppression is required by the Fourth Amendment exclusionary rule.

the tape recording. Examination of the cases cited in *Fuller* clearly shows there is no "reasonable expectation of privacy" component to Article 38.23 standing. *Fuller* refers to two early cases dealing with former Article 727a of the 1925 Code of Criminal Procedure, the predecessor to Article 38.23, which only require ordinary legal standing to complain as to Article 727a and do not mention reasonable expectation of privacy. See *Craft v. State*, 107 Tex. Crim. 130, 295 SW 617 (1927) (appellant could not complain of violation of constitutional rights of another from unlawful search of that person's home); *Jenkins v. State*, 108 Tex. Crim. 184, 299 SW 642 (1927) (testimony regarding illegal search was not admissible against owner of house but was against non-owner co-defendant). *Fuller* mentions several other criminal cases which address basic legal standing, but which do not mention Article 38.23 or its predecessor and clearly do not hold Article 38.23 requires a showing of a reasonable expectation of privacy as a condition of operation of the exclusionary rule. *Fuller* does however refer to several civil cases as to "this State's elemental law of standing," including *Develo-Cepts, Inc. v. City of Galveston* 668 S.W.2d 790, 793-794 (Tex. App. -- Houston [14rh Dist.] 1984), which essentially hold that to have standing a person must have some contractual, or property, or other personal interest in the subject matter of the litigation in an individual or representative capacity. It is clear from analysis of the cases cited in *Fuller* that Article 38.23 only requires elemental standing under Texas law.

The Texas standing rule with respect to Article 38.23 evolved long before the notion of reasonable expectation of privacy as a Fourth Amendment concept surfaced in *Rajas v. Illinois*, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978) relating to the "place" of a search. Moreover, *Fuller* was decided in 1992, long after *Rakas*, and nowhere mentions a reasonable expectation of privacy as a component of standing for the purpose of Article 38.23. *See also State v. Johnson*, 939 S.W.2d 586, 588 n.1 (Tex. Crim. App. 1996) (holding Article 38.23, unlike the Fourth Amendment, requires suppression of evidence unlawfully obtained by private persons).

No exceptions or requirements not appearing on the face of Article 38.23, other than ordinary elemental standing to complain, are recognized by the Court of Criminal Appeals. *Johnson*, 939 S.W.2d at 588; *Daugherty*, 931 S.W.2d at 270; *Garcia*, 829 S.W.2d at 798-800. As a result, the requirement of a reasonable expectation of privacy is not applicable to the exclusionary rule of Article 38.23, and is irrelevant as to whether evidence must be suppressed under Article 38.23. This Honorable Court has no authority to legislate by creating an exception or condition to Article 38.23 not appearing on the face of the statute. Appellee clearly has standing under Article 38.23 to complain of the constitutional and statutory violations in obtaining her medical records and blood alcohol test results found by the trial court and otherwise shown. See *supra* notes 5,7, and 8. Moreover, even if it were a component of standing under Article 38.23, the reasonable expectation of privacy would necessarily have to be that of Texas citizens. See *infra* Point Number Four.

POINT NUMBER FOUR

Appellee has a reasonable expectation of privacy in her medical records and her blood alcohol test results therein for the purpose of Article I, § 9 of the Texas Constitution regardless of Fourth Amendment concerns addressed in *Hardy*. The trial court specifically found the search and seizure in the instant case violative of Article I, § 9 of the Texas Constitution, distinguishing the case from *Hardy* which addressed *only* the concept of reasonable expectation of privacy under the Fourth Amendment, and found Appellee had a reasonable expectation of privacy under Article I, § 9 based upon Texas statutory law and Appellee's contractual rights heretofore discussed. (F.F.C.L., Conclusions of Law at 19-21). See *supra* notes 5, 6, 7, and 8. The Substituted Opinion does not pay due deference to the trial court's findings of fact and conclusions of law in this regard, and does not address the Texas constitutional issues presented herein. *Heitman*, 815 S.W.2d at 690.

The reasonable expectation of privacy required as to Texas citizens under Article I, § 9 of the Texas Constitution is necessarily restricted to the reasonable expectations of *the citizens of Texas*, and not those of the United States generally or other states. Even the majority in *Hardy* recognizes that apart from the question of privilege in criminal cases there are "privileges" in Texas against disclosure of medical records "in civil cases and outside the litigation context." *Hardy*, slip op. at 16, citing Section 5.08 of Medical Practice Act and Section 773.091 of the Health and Safety Code. See discussion of Appellee's standing *supra* note 7 where it was pointed out that Appellee has a legally actionable interest in protecting the confidentiality of and access to her medical records by statute and contract. Statutes express the expectations of the citizens of Texas through their elected representatives in the Legislature, and statutes and ordinances have been held to be clear evidence of a reasonable expectation of privacy. *Chapa*, 729 S.W.2d at 728-729. *See also Richardson v. State*, 865 S.W.2d 944, 953 n.7 (Tex. Crim. App. 1993). *See also Richardson v. State*, 865 S.W.2d 944, 953 n.7 (Tex. Crim. App.1993). The existence os statutory and contractual rights giving Appellee control of access to her medical records in the State of Texas is all that is necessary to find that Appellee has a reasonable expectation of privacy and hence standing to complain of an illegal search and invoke the exclusionary rule under Article

I, § 9 of the Texas Constitution. This issue was not addressed in *Hardy*, and Appellee is entitled to have it ruled on by this Court. *Heitman, supra; Romero, supra*. This Honorable Court should accordingly hold, regardless of the erroneous Fourth Amendment interpretation by the majority in *Hardy*, that Appellee has a reasonable expectation of privacy in her medical records, including her blood alcohol test results, under Article I, § 9 of the Texas Constitution for the reasons stated.

POINT NUMBER FIVE

Appellee's blood alcohol test result must be suppressed under the Fourth Amendment exclusionary rule because it was a *product* of the illegal search of her medical records irrespective of whether she had a reasonable expectation of privacy in the test result itself. The seizure in the instant case was all of Appellee's medical records.[10] This Honorable Court has specifically held in its tow prior opinions affirming the judgment and now implicitly holds in the Substituted Opinion that Appellee has a reasonable expectation of privacy in her medical records, an issue not addressed in *Hardy* (slip op. at 21), by affirming the judgment as to suppression of Appellee's medical records.[11] Appellee thus has standing to complain of the unlawful search of her medical records because she has a reasonable expectation of privacy in same by virtue of this Honorable Court's own determination. Appellee's blood alcohol test result was the *product* of the unreasonable, unlawful seizure and search of her medical records and as such must be suppressed under the Fourth Amendment exclusionary rule regardless of whether she has a reasonable expectation of privacy in the test result itself.

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[10] The bogus grand jury subpoena used to seize Appellee's medical records called for all "Records for Jennifer Marie Conrad dob 10-3 treatment for 5/6/94." (Appendix, Exhibit 3; Ex.3 at trial). This subpoena was not the narrowly tailored type as in *Hardy* which called for only production of Hardy's test result in the form of alcohol or drug information pertaining to treatment. *Hardy*, slip op. at 2, 19-20. Instead, as found by the trial court (F.F.C.L.,Sections VI and VII at 25-27), the seizure of Appellee's medical records led to an unlawful general exploratory search of same. The search itself was unlawful under the Fourth Amendment because (1) it was a general exploratory search and (2) it did not occur pursuant to a judicial warrant issued on probable cause or meet any exception to the warrant requirement for a search (F.F.C.L., Findings of Fact, Nos. 2 and 3 at 15).

WHEREFORE, PREMISES CONSIDERED, Appellee moves that a rehearing be granted, that the Substituted Opinion and Judgment of December 11, 1997 be set aside, and that the trial court's suppression order be in all things affirmed as to suppression of Appellee's medical records and blood alcohol test results for the reasons herein.

Respectfully submitted,

RICHARD HAYNES & ASSOCIATES, P.C.
/s/ Donald W. Roger, Jr.
DONALD W. ROGER, JR.
State Bar No. 1719500
Lead Counsel
4300 Scotland
Houston, Texas 77007
(713) 868-1111
(713) 863-9934 (telecopier)

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[11] *Hardt* addressed only the question of reasonable expectation of privacy under the Fourth Amendment in a blood alcohol test result, and erroneously resolved the issue contrary to controlling Supreme Court authority. *See Skinner v. Railway Labor Exec. Assn*, 489 U.S. 602, 616-617, 109 S.Ct. 1402, 1412-1413, 103 L.Ed.2d 639, 659-660 (1989); *Villareal v. State*, 935 S.W.2d 134, 146-147 (1996) (Keller concurring). *See also* Appellee's supplemental brief filed 12/3/97 at 27-41.

ATTORNEY FOR APPELLEE

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the attached and foregoing Appellee's Motion for Rehearing has been served upon the Harris County District Attorney's Office, Appellate Section, by leaving a copy with the Clerk of this Honorable Court for that purpose as allowed by local custom as of the date of filing this motion, namely January 16, 1998.

/s/ Donald W. Rogers, Jr.
DONALD W. ROGERS, JR.

APPENDIX K

Tex.Rev.Civ.Stat.Ann. art. 4495b, §5.08 (Vernon Supp. 1994).

Physician-patient communication

Sec. 5.08. (a) Communications between one licensed to practice medicine, relative to or in connection with any professional services as a physician to a patient, is confidential and privileged and may not be disclosed except as provided in this section.

(b) Records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician are confidential and privileged and may not be disclosed except as provided in this section.

(c) Any person who receives information from confidential communications or records as described in this section other than the persons listed in Subsection (h) of this section who are acting on the patient's behalf may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

(d) The prohibitions of this section continue to apply to confidential communications or records concerning any patient irrespective of when the patient received the services of a physician, except for medical records 100 years old or older requested for historical research purposes.

(e) The privilege of confidentiality may be claimed by the patient or physician acting on the patient's behalf.

(f) The physician may claim the privilege of confidentiality, but only on behalf of the patient. The authority to do so is presumed in the absence of evidence to the contrary.

(g) Exceptions to confidentiality or privilege in court or administrative proceedings exist:

(1) when the proceedings are brought by the patient against a physician, including but not limited to malpractice proceedings, and any criminal or license revocation proceeding in which the patient is a complaining witness and in which disclosure is relevant to the claims or defense of a physician;

(2) when the patient or someone authorized to act on his behalf submits a written consent to the release of any confidential information, as provided in Subsection (j) of this section;

(3) when the purpose of the proceedings is to substantiate and collect on a claim for medical services rendered to the patient;

(4) in any civil litigation or administrative proceeding, if relevant, brought by the patient or someone on his behalf if the patient is attempting to recover monetary damages for any physical or mental condition including death of the patient. Any information is discoverable in any court or administrative proceeding in this state if the court or administrative body has jurisdiction over the subject matter, pursuant to rules of procedure specified for the matters;

(5) in any disciplinary investigation or proceeding of a physician conducted under or pursuant to this Act, provided that the board shall protect the identity of any patient whose medical records are examined, except for those patients covered under Subdivision (1) of Subsection (g) of this section or those patients who have submitted written consent to the release of their medical records as provided by Subsection (j) of this section;

(6) in any criminal investigation of a physician in

which the board is participating or assisting in the investigation or proceeding by providing certain medical records obtained from the physician, provided that the board shall protect the identity of any patient whose medical records are provided in the investigation or proceeding, except for those patients covered under Subdivision (1) of Subsection (g) of this action or those patients who have submitted written consent to the release of their medical records as provided by Subsection (j) of this section. This subsection does not authorize the release of any confidential information for the purposes of instigating or substantiating criminal charges against a patient;

(7) in an involuntary civil commitment proceeding, proceeding for court-ordered treatment, or probable cause hearing under:

(A) the Texas Mental Health Code (Article 5547-1 et seq., Vernon's Texas Civil Statutes);

(B) the Mentally Retarded Persons Act of 1977 (Article 5547-300, Vernon's Texas Civil Statutes);[12]

(C) Section 9, Chapter 411, Acts of the 53rd Legislature, Regular Session, 1953 (Article 5561c, Vernon's Texas Civil Statutes);

(D) Section 2, Chapter 543, Acts of the 61st Legislature, Regular Session, 1969 (Article 5561c, Vernon's Texas Civil Statutes); or

(8) in any criminal prosecution where the patient is a victim, witness, or defendant. Records are not discoverable until the court in which the prosecution is pending makes an in camera determination as to the relevancy of the records or communications or any portion thereof. Such determination shall not constitute a determination as to the admissibility of

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[12] "Mentally Retarded Persons Act of 1977" reference means the "Persons With Mental Retardation Act", as provided in Acts 1991, 72nd Leg., ch. 76, § 2, eff. Sept. 1, 1991.

such records or communications or any portion thereof.

(h) Exceptions to the privilege of confidentiality, in other than court or administrative proceedings, allowing disclosure of confidential information by a physician, exist only to the following:

(1) governmental agencies if the disclosures are required or authorized by law;

(2) medical or law enforcement personnel if the physician determines that there is a probability of imminent physical injury to the patient, to himself, or to others, or if there is a probability of immediate mental or emotional injury to the patient;

(3) qualified personnel for the purpose of management audits, financial audits, program evaluations, or research, but the personnel may not identify, directly or indirectly, a patient in any report of the research, audit, or evaluation or otherwise disclose identity in any manner;

(4) those parts of the medical records reflecting charges and specific services rendered when necessary in the collection of fees for medical services provided by a physician or physicians or professional associations or other entities qualified to render or arrange for medical services;

(5) any person who bears a written consent of the patient or other person authorized to act on the patient's behalf for the release of confidential information, as provided by Subsection (j) of this section;

(6) individuals, corporations, or governmental agencies involved in the payment or collection of fees for medical services rendered by a physician;

(7) other physicians and personnel under the direction of the physician who are participating in the diagnosis, evaluation, or treatment of the patient; or

(8) in any official legislative inquiry regarding state hospitals or state schools, provided that no information or records which identify a patient or client shall be released for any purpose unless proper consent to the release is given by

the patient, and only records created by the state hospital or school or its employees shall be included under this subsection.

(i) Exceptions to the confidentiality privilege in this Act are not affected by any statute enacted before the effective date of this Act.

(j)(1) Consent for the release of confidential information must be in writing and signed by the patient, or a parent or legal guardian if the patient is a minor, or a legal guardian if the patient has been adjudicated incompetent to manage his personal affairs, or an attorney ad litem appointed for the patient, as authorized by the Texas Mental Health Code (Article 5547-1 et seq., Vernon's Texas Civil Statutes); the Mentally Retarded Persons Act of 1977 (Article 5547-300, Vernon's Texas Civil Statutes); Section 9, Chapter 411, Acts of the 53rd Legislature, Regular Session, 1953 (Article 5561c, Vernon's Texas Civil Statutes); Section 2, Chapter 543, Acts of the 61st Legislature, Regular Session, 1969 (Article 5561c-1, Vernon's Texas Civil Statutes); Chapter 5, Texas Probate Code;[13] and Chapter 11, Family Code; or a personal representative if the patient is deceased, provided that the written consent specifies the following:

(A) the information or medical records to be covered by the release;

(B) the reasons or purposes for the release; and

(C) the person to whom the information is to be released.

(2) The patient, or other person authorized to consent, has the right to withdraw his consent to the release of any information. Withdrawal of consent does not affect any information disclosed prior to the written notice of the withdrawal.

(3) Any person who receives information made confidential by this Act may disclose the information to

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[13] V.A.T.S. Probate Code, § 72 et seq.

others only to the extent consistent with the authorized purposes for which consent to release the information was obtained.

(k) A physician shall furnish copies of medical records requested, or a summary or narrative of the records, pursuant to a written consent for release of the information as provided by Subsection (j) of this section, except if the physician determines that access to the information would be harmful to the physical, mental, or emotional health of the patient, and the physician may delete confidential information about another person who has not consented to the release. The information shall be furnished by the physician within 30 days after the date of receipt of the request and reasonable fees for furnishing the information shall be paid by the patient or someone on his behalf. If the physician denies the request, in whole or in part, the physician shall furnish the patient a written statement, signed and dated, stating the reason for the denial. A copy of the statement denying the request shall be placed in the patient's medical records. In this subsection, "medical records" means any records pertaining to the history, diagnosis, treatment, or prognosis of the patient.

(l) A person aggrieved by a violation of this section relating to the unauthorized release of confidential and privileged communications may petition the district court of the county in which the person resides, or in the case of a nonresident of the state, the District Court of Travis County, for appropriate injunctive relief, and the petition takes precedence over all civil matters on the docketed court except those matters to which equal precedence on the docket is granted by law. A person aggrieved by a violation of this section relating to the unauthorized release of confidential and privileged communications may prove a cause of action for civil damages.

(m) "Patient" for the purposes of this section means any person who consults or is seen by a person licensed to practice medicine to receive medical care.

(n) A person who may provide a copy of a record, or a summary or narrative of the record, to another under this section may provide the copy, summary, or narrative:

(I) on paper; or

(2) on microfilm, microfiche, computer hard disk, magnetic tape, or optical disk or by means of another appropriate medium, including a machine-readable medium, if the person who is to provide and the person who is to receive the copy, summary, or narrative agree to a form authorized by this subdivision.

APPENDIX L

Tex. Rev. Civ. Stat. Ann. art. 4495b, § 5.08 (Vernon Supp. 1999)

Physician-patient communication

Sec. 5.08. (a) Communications between one licensed to practice medicine, relative to or in connection with any professional services as a physician to a patient, is confidential and privileged and may not be disclosed except as provided in this section.

(b) Records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician are confidential and privileged and may not be disclosed except as provided in this section.

(c) Any person who receives information from confidential communications or records as described in this section other than the persons listed in Subsection (h) of this section who are acting on the patient's behalf may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

(d) The prohibitions of this section continue to apply to confidential communications or records concerning any patient irrespective of when the patient received the services of a physician, except for medical records 100 years old or older requested for historical research purposes.

(e) The privilege of confidentiality may be claimed by the patient or physician acting on the patient's behalf.

(f) The physician may claim the privilege of confidentiality, but only on behalf of the patient. The authority to do so is presumed in the absence of evidence to the contrary.

(g) Exceptions to confidentiality or privilege in court or administrative proceedings exist.

(1) when the proceedings are brought by the patient against a physician, including but not limited to malpractice proceedings, and any criminal or license revocation proceeding in which the patient is a complaining witness and in which disclosure is relevant to the claims or defense of a physician;

(2) when the patient or someone authorized to act on his behalf submits a written consent to the release of any confidential information, as provided in Subsection (j) of this section;

(3) when the purpose of the proceedings is to substantiate and collect on a claim for medical services rendered to the patient;

(4) in any civil litigation or administrative proceeding, if relevant, brought by the patient or someone on his behalf if the patient is attempting to recover monetary damages for any physical or mental condition including death of the patient. Any information is discoverable in any court or administrative proceeding in this state if the court or administrative body has jurisdiction over the subject matter, pursuant to rules of procedure specified for the matters;

(5) in any disciplinary investigation or proceeding of a physician conducted under or pursuant to this Act, provided that the board shall protect the identity of any patient whose medical records are examined, except for those patients covered under Subdivision (1) of Subsection (g) of this section or those patients who have submitted written consent to the release of their medical records as provided by Subsection (j) of this section;

(6) in any criminal investigation of a physician in which the board is participating or assisting in the investigation or proceeding by providing certain medical records obtained from the physician, provided that the board shall protect the identity of any patient whose medical records are provided in the investigation or proceeding, except for those patients covered under Subdivision (1) of

Subsection (g) of this section or those patients who have submitted written consent to the release of their medical records as provided by Subsection (j) of this section. This subsection does not authorize the release of any confidential information for the purpose of instigating or substantiating criminal charges against a patient;

(7) in an involuntary civil commitment proceeding, proceeding for court-ordered treatment, or probable cause hearing under:

(A) Chapter 574, Health and Safety Code;

(B) Chapter 593, Health and Safety Code; or

(C) Chapter 462, Health and Safety Code;

(8) when the patient's physical or mental condition is relevant to the execution of a will;

(9) when the information is relevant to a proceeding brought under Subsection (1) of this section;

(10) in any criminal prosecution where the patient is a victim, witness, or defendant. Records are not discoverable until the court in which the prosecution is pending makes an in camera determination as to the relevancy of the records or communications or any portion thereof. Such determination shall not constitute a determination as to the admissibility of such records or communications or any portion thereof;

(11) to satisfy a request for medical records of a deceased or incompetent person pursuant to Section 4.01(e), Medical Liability and Insurance Improvement Act of Texas (Article 4590i, Vernon's Texas Civil Statutes); or

(12) to a court or a party to an action pursuant to a court order or court subpoena.

(h) Exceptions to the privilege of confidentiality, in other than court or administrative proceedings, allowing disclosure of confidential information by a physician, exist only to the following:

(1) governmental agencies if the disclosures are required or authorized by law;

(2) medical or law enforcement personnel if the physician determines that there is a probability of imminent physical injury to the patient, to himself, or to others, or if there is a probability of immediate mental or emotional injury to the patient;

(3) qualified personnel for the purpose of management audits, financial audits, program evaluations, or research, but the personnel may not identify, directly or indirectly, a patient in any report of the research, audit, or evaluation or otherwise disclose identity in any manner;

(4) those parts of the medical records reflecting charges and specific services rendered when necessary in the collection of fees for medical services provided by a physician or physicians or professional associations or other entities qualified to render or arrange for medical services;

(5) any person who bears a written consent of the patient or other person authorized to act on the patient's behalf for the release of confidential information, as provided by Subsection (j) of this section;

(6) individuals, corporations, or governmental agencies involved in the payment or collection of fees for medical services rendered by a physician;

(7) other physicians and personnel under the direction of the physician who are participating in the diagnosis, evaluation, or treatment of the patient;

(8) in any official legislative inquiry regarding state hospitals or state schools, provided that no information or records which identify a patient or client shall be released for any purpose unless proper consent to the release is given by the patient, and only records created by the state hospital or school or its employees shall be included under this subsection; or

(9) to health care personnel of a penal or other custodial institution in which the patient is detained if the disclosure is for the sole purpose of providing health care to the patient..

(i) Exceptions to the confidentiality privilege in this Act are not affected by any statute enacted before the effective date of this Act.

(j)(1) Consent for the release of confidential information must be in writing and signed by the patient, or a parent or legal guardian if the patient is a minor, or a legal guardian if the patient has been adjudicated incapacitated to manage his personal affairs, or an attorney ad litem appointed for the patient, as authorized by Subtitle C, Title 7, Health and Safety Code; Subtitle D, Title 7, Health and Safety Code; Chapter XIII, Texas Probate Code; and Chapter 11, Family Code; or a personal representative if the patient is deceased, provided that the written consent specifies the following:

(A) the information or medical records to be covered by the release;

(B) the reasons or purposes for the release; and

(C) the person to whom the information is to be released.

(2) The patient, or other person authorized to consent, has the right to withdraw his consent to the release of any information. Withdrawal of consent does not affect any information disclosed prior to the written notice of the withdrawal. A patient may not maintain an action against a physician for a disclosure made by the physician in good faith reliance on an authorization if the physician did not have written notice that the authorization was revoked.

(3) Any person who receives information made confidential by this Act may disclose the information to others only to the extent consistent with the authorized purposes for which consent to release the information was obtained.

(k) A physician shall furnish copies of medical records requested, or a summary or narrative of the records, including records received from a physician or other health care provider involved in the care or treatment of the patient, pursuant to a written consent for release of the information as provided by Subsection (j) of this section, except if the physician determines that access to the information would be harmful to the physical, mental, or emotional health of the patient, and the physician may delete confidential information about another patient or family member of the patient who has not consented to the release. The information shall be furnished by the physician within 30 days after the date of receipt of the request. If the physician denies the request, in whole or in part, the physician shall furnish the patient a written statement, signed and dated, stating the reason for the denial. A copy of the statement denying the request shall be placed in the patient's medical records.

(l) A person aggrieved by a violation of this section relating to the unauthorized release of confidential and privileged communications may petition the district court of the county in which the person resides, or in the case of a nonresident of the state, the District Court of Travis County, for appropriate injunctive relief, and the petition takes precedence over all civil matters on the docketed court except those matters to which equal precedence on the docket is granted by law. A person aggrieved by a violation of this section relating to the unauthorized release of confidential and privileged communications may prove a cause of action for civil damages.

(m) "Patient" for the purposes of this section means any person who consults or is seen by a person licensed to practice medicine to receive medical care.

(n) A person who may provide a copy of a record, or a summary or narrative of the record, to another under this section may provide the copy, summary, or narrative:

(1) on paper; or

(2) on microfilm, microfiche, computer hard disk, magnetic tape, or optical disk or by means of another appropriate medium, including a machine-readable medium, if the person who is to provide and the person who is to

receive the copy, summary, or narrative agree to a form authorized by this subdivision.

(o) The physician may charge a reasonable fee for copying medical records and is not required to permit examination or copying until the fee is paid unless there is a medical emergency. The board by rule shall prescribe what constitutes reasonable fees for purposes of this subsection.

(p) A physician may not charge a fee for copying medical records under Subsection (o) of this section to the extent the fee is prohibited under Subchapter M, Chapter 161, Health and Safety Code.

APPENDIX M

THE STATE OF TEXAS	IN THE MATTER OF A
COUNTY OF HARRIS	GRAND JURY INVESTIGATION

TO THE SHERIFF OR ANY OTHER TEXAS
PEACE OFFICER

GREETINGS:

WHEREAS the grand jury of Harris County is inquiring into certain offenses liable to indictment; and

WHEREAS A 20.10 of the Texas Code of Criminal Procedure provides that the attorney representing the state, in term time or in vacation, may issue a summons or an attachment for any witness in the county, which summons or attachment may require the said witness to appear before the grand jury at a time fixed, or forthwith, without stating the matter under investigation; and

WHEREAS any Texas peace officer receiving this process shall execute the same forthwith by reading the same in the hearing of the said witness or by delivering a copy of this process to the named witness and thereafter due return make showing the time and manner of service, if served, and if not served, said officer shall show in his return the cause of his failure to serve it; and if the witness could not be found, he shall state the diligence he has used to find him, and what information he has as to the whereabouts of the witness;

NOW THEREFORE YOU ARE HEREBY COMMANDED to forthwith summon, Custodian of Records, Katy Community Hospital, Records for Jennifer Marie Conrad dob 10-3 treatment for 5-6-94, to appear before the 176th Judicial District Court Grand Jury for the

May Term, 1994, at 403 Caroline, 1^{st} Floor, Houston, Texas, at Instanter a.m. on __, 19__.

The officer receiving this process is instructed to inform said witness that our law provides that a witness who refuses to obey a subpoena may be fined, or an attachment may be issued commanding an officer to take the body of the witness and bring him before the court or the grand jury forthwith. A witness has refused to obey a subpoena if he is not in attendance on the day set for attendance or if the witness refuses without legal cause to produce evidence in his possession which he has been summoned to bring with him and produce.

HEREIN FAIL NOT, and due return make of this process in accordance with law as provided in such cases.

WITNESS MY SIGNATURE, on this the 15 day of May, 1994.

S E A L

(S) C Sckerl
Assistant District Attorney
Harris County, Texas

Defendant's Exhibit
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3/27/95